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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 123

HARVEY S. ADAMS, RECEIVER, PENN NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA, PETITIONER,

vs.

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY AND WILLIAM M. MAYER

No. 124

HARVEY S. ADAMS, RECEIVER, READING NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA, PETITIONER,

vs.

J. EDWIN TOBIAS, RALPH S. HILL AND OSCAR P. SMITH

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 8, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DECEMBER TERM, 1934

No. 8525

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY and WILLIAM M. MAYER,

vs.

J. F. T. O'CONNOR, Comptroller of the Currency, and WILLIAM H. McGOWAN, Rec'r of Penn National Bank & Trust Co. of Reading

DOCKET ENTRIES

Feb. 23, 1935. Bill of Complaint filed.

Feb. 23, 1935. Subpœna exit—returnable March 15, 1935.

Feb. 23, 1935. Duplicate original subpœna exit—returnable March 15, 1935.

Mar. 5, 1935. Motion for Preliminary Injunction filed.

Mar. 5, 1935. Injunction affidavits filed.

Mar. 5, 1935. Decree fixing time for hearing on motion for preliminary injunction filed.

Mar. 5, 1935. Subpœna returned "served on February 27, 1935" and filed.

Mar. 5, 1935. Duplicate original subpœna returned "Served on February 27, 1935" and filed.

Mar. 8, 1935. Motion to dismiss bill of complaint by Wm. R. McGowan, Received, etc. filed.

[fol. 2] Mar. 8, 1935. Appearance of Chas. W. Matten and Harry R. Matten, Esqs., for Wm. R. McGowan etc. filed.

Mar. 8, 1935. Motion by J. F. T. O'Connor, Comptroller etc. to quash subpœna, filed.

Mar. 8, 1935. Appearance de bene esse of Chas. W. Matten and Harry R. Matten, Esqs., for J. F. T. O'Connor, Comptroller etc. filed.

Mar. 9, 1935. Affidavit of service of copies of motion to dismiss and motion to quash etc. filed.

DOCKET ENTRIES—Continued

Mar. 12, 1935. Affidavit of service of order fixing time for hearing etc. filed.

Mar. 15, 1935. Affidavit of service of motion for Preliminary Injunction etc. filed.

Apr. 15, 1935. Argued sur motion to quash service of writ; to dismiss bill of complaint and for preliminary injunction.

May 1, 1935. Opinion, Kirkpatrick J., dismissing bill of complaint filed.

May 29, 1935. Motion for leave to file amendment to bill of complaint filed.

June 17, 1935. Argued sur motion to amend.

June 25, 1935. Opinion, Kirkpatrick J., granting leave to amend bill and granting motion to quash process filed.

June 25, 1935. Decree granting leave to amend bill, granting motion to quash service of process, denying motion for preliminary injunction and dismissing bill of complaint with costs filed.

July 22, 1935. Order of Court directing that opinion of [fol. 3] Court stand as its findings of fact and conclusions of law filed.

Aug. 5, 1935. Order of Court allowing amendments to bill of complaint nunc pro tunc as of June 25, 1935, filed.

Aug. 5, 1935. Assignments of error filed.

Aug. 5, 1935. Petition for appeal filed.

Aug. 9, 1935. Order of Court allowing appeal filed.

Aug. 9, 1935. Bond for costs sur appeal in $250.00 with Standard Accident Insurance Co. surety, and Order approving bond filed.

Aug. 9, 1935. Copy of notice of appeal filed.

Aug. 9, 1935. Citation allowed and issued.

Aug. 9, 1935. Stipulation of counsel and Order of Court consolidating this case with cause No. 8527 for purpose of appeal filed.

Sept. 9, 1935. Citation returned: "service accepted" and filed.

Sept. 9, 1935. Præcipe for transcript of record sur appeal filed.

IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT—Filed February 23, 1935

To the Honorable the Judges of Said Court:

Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Moyer, citizens of the State of Pennsylvania, residing in the County of Berks in said State, bring this their Bill of Complaint on their own behalf and on behalf of all other stockholders of Penn National Bank and Trust Company of Reading, who may become parties to and join in the prosecution of this suit, and contribute to the ex-
[fol. 4] pense thereof, against J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, and say:

1. The ground upon which the jurisdiction of this Court depends is that this is a suit in equity for winding up the affairs of a national bank, and is brought by stockholders on a cause of action enuring to a national bank established in this District, under the provisions of the National Bank Act, to enjoin the Comptroller of the Currency and a Receiver acting under his directions as provided by said National Bank Act.

2. Plaintiffs are citizens of the United States residing in the County of Berks in the State of Pennsylvania, and are stockholders of Penn National Bank and Trust Company of Reading, a national banking association organized and existing under and by virtue of the banking laws of the United States, having prior to February 18, 1933 been engaged in general banking business, with principal office and place of business in the City of Reading, County of Berks and State of Pennsylvania.

3. The capital stock of said Penn National Bank and Trust Company of Reading consists of 100,000 shares of the par value of $10 each, and there are approximately 850 shareholders, including plaintiffs, which constitute a class so numerous as to make it impracticable to bring them before this Court and join them in this suit in which the question to be determined is one of common and general interests to all of said class involving the identical points

of fact and law, for which reason plaintiffs bring this suit on behalf of all of such class.

4. Defendant, J. F. T. O'Connor, is Comptroller of the Currency, in the Treasury Department of the United States, [fol. 5] and a resident and inhabitant of the City of Washington in the District of Columbia.

5. Defendant, William H. McGowan, is Receiver of said Penn National Bank and Trust Company of Reading by appointment of the Comptroller of the Currency dated November 26, 1934, and is a resident and inhabitant of the City of Reading, County of Berks and State of Pennsylvania

6. On February 17, 1933 said Penn National Bank and Trust Company of Reading, hereinafter referred to as Penn National Bank, and Reading National Bank and Trust Company, hereinafter referred to as Reading National Bank, entered into an agreement with Farmers National Bank and Trust Company of Reading, hereinafter referred to as Farmers National Bank, national banking associations organized and existing under and by virtue of the banking laws of the United States being then engaged in general banking business with principal offices and places of business in the City of Reading, County of Berks and State of Pennsylvania, wherein among other things, Reading National Bank and Penn National Bank in contemplation of a consolidation with Farmers National Bank agreed forthwith to transfer and assign all of their assets to Farmers National Bank with the right to hypothecate and rehypothecate any or all of such assets, but conditioned upon the assumption by Farmers National Bank of all the deposit liabilities as well as all other liabilities of said Penn National Bank and Reading National Bank excepting liabilities to stockholders as such, which agreement was duly accepted by said Farmers National Bank. A true and correct copy of said agreement is hereto attached, made part hereof and marked Exhibit "A".

[fol. 6] 7. On February 20, 1933 at the direction of the Comptroller of the Currency, said Penn National Bank together with Reading National Bank entered into a supplemental agreement with Farmers National Bank wherein said Penn National Bank and Reading National Bank guar-

anteed to the Farmers National Bank that the assets of their respective banks would in value exceed the deposit liability and other liabilities assumed by said Farmers National Bank by virtue of said agreement of February 17, 1933. A true and correct copy of said supplemental agreement is hereto attached, made part hereof, and marked Exhibit "B".

8. Prior to and at the time of the execution of said agreement of February 17, 1933, said Penn National Bank was subjected to unusual withdrawals of deposits, resulting in a reserve deficiency and placing it on the verge of insolvency and because of such emergency the Board of Directors of said bank by resolution duly authorized the execution of said agreement of February 17, 1933 and the supplemental agreement of February 20, 1933.

9. On February 17, 1933, said Penn National Bank and Reading National Bank transferred and delivered to said Farmers National Bank all their assets, surrendered complete control and possession thereof, as well as their business, and in accordance with the provisions of said agreement said Farmers National Bank appointed executive officers to conduct its business at the former places of business of said Penn National Bank and Reading National Bank under the designation of branches of said Farmers National Bank thereafter with the knowledge, approval and acquiescence of the Comptroller of the Currency, his agents and representatives, ceased to exercise any control [fol. 7] or dominion over their former assets and ceased to transact any business whatsoever.

10. At the time of the execution of said agreement of February 17, 1933, and the transfer and delivery of all the assets to said Farmers National Bank, the assets of said Penn National Bank covered by said agreement and transferred and delivered as aforesaid consisted of cash on hand and due from banks, securities, loans and discounts, mortgage loans, real estate and other assets, of a value in excess of $6,500,000, which said assets after depreciation of over $1,000,000, represented a fair and reasonable market net value as of said date of over $5,400,000.

11. At the time of the execution of said agreement of February 17, 1933, and the transfer and delivery of all the

assets of said Penn National Bank to Farmers National Bank, the deposit liability together with all other liabilities of said Penn National Bank which were assumed by said Farmers National Bank consisting of demand deposits, time deposits, items due to banks, bills payable and rediscounts and all other liabilities, amounted to approximately $5,100,000.

12. Said Penn National Bank under said agreement of February 17, 1933, transferred and delivered to Farmers National Bank assets having a fair and reasonable value in excess of the deposit liability and all other liabilities of said Penn National Bank in the sum of approximately $350,000, and said Penn National Bank duly performed and complied with all the terms and provisions of said agreement of February 17, 1933 and the supplemental agreement of February 20, 1933, by which said Penn National Bank guaranteed that its assets in value would exceed its deposit and [fol. 8] all other liabilities assumed by said Farmers National Bank.

13. Under the terms and provisions of said agreement of February 17, 1933, and its due performance, as well as the due performance of said supplemental agreement of February 20, 1933, said Farmers National Bank became liable to said Penn National Bank for the payment of all of its deposit liability and all other liabilities of said Penn National Bank, except liabilities to stockholders as such in the total amount of approximately $5,100,000, as well as liable to all depositors and other creditors of said Penn National Bank for the amounts of their respective claims.

14. Immediately upon the execution of said agreement of February 17, 1933, said Farmers National Bank, with its combined resources and liabilities comprising its own original resources and liabilities and those derived from said Penn National Bank and Reading National Bank, carried on and conducted its regular banking business, comingled all its assets regardless of their source or origin and used the same indiscriminately in the conduct of its business and in the discharge of its obligations whether original or assumed.

15. On March 18, 1933, the Acting Comptroller of the Currency, certified that said Farmers National Bank was unable to transact and carry on its ordinary banking busi-

ness, or to exercise its usual banking functions without prejudicing the rights of depositors and other creditors, and that he deemed it necessary to take immediate steps in order to conserve the assets of said bank for the benefit of depositors and other creditors, and thereupon appointed Wellington M. Bertolet, Conservator of said Farmers National Bank under the provisions of the Conservation Act of March 9, 1933.

[fol. 9] 16. Thereupon and on or about March 20, 1933, said Wellington M. Bertolet as such conservator, under the direction of the Comptroller of the Currency, took possession of the books, records and assets of every description of said Farmers National Bank, which included not only the original books, records and assets of said bank, but those acquired by said bank under the terms of said agreement of February 17, 1933, from said Penn National Bank and Reading National Bank, and thereafter said Wellington M. Bertolet as such conservator of said Farmers National Bank pursuant to his duty as such administered all the assets of said Farmers National Bank including the assets which had been derived by said Farmers National Bank from said Penn National Bank and Reading National Bank.

17. On or about October 10, 1933, said J. F. T. O'Connor, Comptroller of the Currency, without notice of any kind to said Penn National Bank, its depositors and other creditors, or the stockholders thereof, and without a hearing, and without warrant or authority of law or a decree or order of any Court of competent jurisdiction, made a ruling to the effect that said agreements of February 17, 1933 and February 20, 1933 were without legal effect, and directed that the transfer and delivery of assets and the assumption of liabilities thereunder should be disregarded, and attempted to allocate among the Farmers National Bank, Penn National Bank and Reading National Bank assets transferred and delivered theretofore to said Farmers National Bank.

18. Said defendant, J. F. T. O'Connor, Comptroller of the Currency, in pursuance of said ruling, thereupon under [fol. 10] date of October 10, 1933, certified that said Penn National Bank and Reading National Bank were unable to transact and carry on their ordinary banking business, or to exercise their usual banking facilities without prejudicing the rights of depositors and other creditors, and that he

deemed it necessary to take immediate steps for the benefit of the depositors and other creditors thereof, and thereupon appointed Wellington M. Bertolet as conservator of the Penn National Bank, and said Wellington M. Bertolet as conservator of Reading National Bank, under the provisions of the Conservation Act of March 9, 1933.

19. Under date of October 20, 1933, said defendant, J. F. T. O'Connor, Comptroller of the Currency, proposed a so-called plan of reorganization of said Farmers National Bank, Penn National Bank and Reading National Bank, based upon his said ruling, providing for the organization of a new national bank and the issuance of stock and securities, a pledge of assets to secure a loan from the Reconstruction Finance Corporation, and a sale of the assets to the new national bank, and a division of the proceeds on the basis of 35% to Farmers National Bank, 25% to Penn National Bank and 25% to Reading National Bank, which division was arbitrary and based on a classification adopted from the report of the National Bank Examiners of April 24, 1933, and not on the basis of the financial condition of said banks as of the date of the execution of said agreement and the transfer of assets and assumption of liability thereunder, to wit, February 17, 1933.

20. Said Wellington M. Bertolet, as conservator of each of said banks, each of which had interests adverse to each other, in furtherance of the socalled plan of reorganization [fol. 11] arbitrarily reconstructed the assets and liabilities of each of said banks as of April 24, 1933, made an arbitrary division thereof among each of said banks, made a sale in gross of certain assets and apportioned the proceeds thereof under the prearranged schedule of 35% to Farmers National Bank, 25% to Penn National Bank and 25% to Reading National Bank.

21. Said Wellington M. Bertolet as conservator of each of said banks, pursuant to instructions of, and in accordance with said ruling of said defendant, J. F. T. O'Connor, Comptroller of the Currency, abrogating said agreements of February 17, 1933 and February 20, 1933, and all rights and obligations thereunder, ignored and disregarded the claims of Penn National Bank in the amount of approximately $5,100,000 against said Farmers National Bank in the re-

construction of the financial condition of said banks, upon which the so-called plan of reorganization was based.

22. Said ruling of said defendant, J. F. T. O'Connor, Comptroller of the Currency, and his acts thereunder abrogating said agreements of February 17, 1933 and February 20, 1933, and all the rights and obligations accrued thereunder was beyond the powers conferred upon him under the National Bank Act or other statutory law, was an unlawful assumption of judicial powers neither delegated to him by statute nor capable of being delegated, and was in violation of the rights of said Penn National Bank, its depositors and other creditors and stockholders thereof, and deprived them of their property without due process of law.

23. After the completion of the so-called plan of reorganization of the three banks, said defendant, J. F. T. O'Connor, Comptroller of the Currency, certified that each of said [fol. 12] banks was insolvent and unable to pay its just and legal debts, and thereupon, on October 27, 1934, appointed Harvey S. Adams as receiver for the Reading National Bank, on November 8, 1934 appointed Edward C. Nolan as receiver for the Farmers National Bank and on November 26, 1934 appointed William H. McGowan as receiver for said Penn National Bank.

24. On January 15, 1935, said defendant, J. F. T. O'Connor, Comptroller of the Currency, made an assessment upon the shareholders of said Penn National Bank, wherein he recited that upon a proper accounting by the Receiver to collect the assets of said bank, and upon a valuation of the uncollected assets remaining in his hands it appeared to his satisfaction that in order to pay the debts of said bank, it was necessary to enforce the individual liability of the stockholders in accordance with the Act of Congress. A true and correct copy of such assessment is hereto annexed, made part hereof, and marked Exhibit "C".

25. Said defendant, J. F. T. O'Connor, Comptroller of the Currency, and said Wellington M. Bertolet, conservator first of said Farmers National Bank and later of said Penn National Bank, and said defendant, William H. McGowan, receiver of said Penn National Bank, failed, neglected and refused to collect said claim of approximately $5,100,000 of

said Penn National Bank against said Farmers National Bank, which was the only and ordinary resource of said Penn National Bank for the payment of its creditors, and on the contrary, without warrant or authority of law, cancelled, abrogated and waived said claim in fraud of the rights of said Penn National Bank, its depositors and other creditors and stockholders thereof, and by reason thereof [fol. 13] failed to comply with the conditions and provisions of the National Bank Act upon which stockholders of a national bank may be assessed.

26. The alleged valuation of the remaining assets made by said defendant, J. F. T. O'Connor, Comptroller of the Currency, upon an alleged proper accounting, on which said assessment upon the stockholders of said Penn National Bank was made, excluded as an asset the said claim of Penn National Bank against Farmers National Bank of approximately $5,100,000 and involved a grave error of law based upon his unwarranted assumption of judicial power in abrogating, cancelling and waiving said claim of Penn National Bank against said Farmers National Bank, and adjudicating the private rights and obligations of parties not subject to his power and control, whereby the said assessment is invalid and illegal.

27. Plaintiffs are without an adequate remedy by any of the ordinary processes of law, and are prohibited by law from making a defense to such assessment on the grounds here alleged, and can secure redress only by interposition of a Court of equity in this proceeding.

28. Said defendant, William H. McGowan, receiver as aforesaid, under instructions from said defendant, J. F. T. O'Connor, Comptroller of the Currency, has notified all stockholders of said Penn National Bank that said assessment is payable on or before February 23, 1935, that those stockholders may have an extension who pay 25% of their said assessment on or before said date, and give their written obligation, satisfactorily guaranteed, to pay 25% on or before March 23, 1935, 25% on or before April 23, 1935, and 25% on or before May 23, 1935. Plaintiffs aver that said defendants unless restrained by this Honorable [fol. 14] Court will institute actions against the shareholders who will be unable to make defense thereto on the ground of the invalidity and illegality of said assessment.

Wherefore plaintiffs pray as follows:

1. That said assessment of said defendant, J. F. T. O'Connor, Comptroller of the Currency, under date of January 15, 1935, in the matter of Penn National Bank and Trust Company upon the shareholders thereof for One Million ($1,000,000.) Dollars be declared invalid, illegal and without warrant or authority of law.

2. That an injunction, preliminary to hearing and final thereafter, issue directed to said defendants, J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank & Trust Company restraining them, and each of them, their agents and attorneys from instituting any proceedings at law or otherwise against said stockholders to enforce said assessment.

3. That a temporary restraining order issue until a motion for preliminary injunction may be heard.

4. For such other and further relief as to this Court may seem proper.

Stevens and Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Plaintiffs.

Duly sworn to by Geneva M. Nagle et al. Jurat omitted in printing.

[fol. 15] I hereby certify that there has not been sufficient time within which to print the foregoing Bill of Complaint.

Lemuel B. Schofield.

EXHIBIT "A" TO COMPLAINT

Agreement

This agreement entered into this seventeenth day of February A. D. 1933, by and between Farmers National Bank and Trust Co. of Reading, Pennsylvania, of the First part, Reading National Bank and Trust Company of Reading, of the second part, and Penn National Bank and Trust Co. of Reading, state aforesaid, of the third part.

Witnesseth the parties hereto, in consideration of the mutual covenants, promises and agreements, of each of

them to the other, hereby made, and for and in consideration of the sum of One Dollar by each to the other interchangeably paid, receipt whereof is by each of them hereby acknowledged.

[fol. 16] Do hereby covenant, promise and agree to and with each other, as follows, to wit:

1. The said parties hereby agree to merge the three Companies under the name of Farmers National Bank & Trust Company of Reading in the manner hereinafter agreed upon.

2. A committee composed of a representative of each of the Companies shall be appointed forthwith by the Presidents of the respective Companies to act with Lybrand, Ross Brothers & Montgomery, Certified Public Accountants, for the purpose of valuing the assets of each of said companies at their fair valuation which shall be submitted to the Board of Directors of each of the Companies for approval.

3. When said valuations have been determined, the said accountants shall submit a plan for an adjustment of the capital structure of the Farmers National Bank and Trust Co. of Reading, based on the said valuations and thereupon such appropriate legal action as shall be necessary to effect a recapitalization of the combined companies shall be taken by each Company, the stockholders of the Reading National Bank and Trust Company shall jointly receive such proportion of the capital stock of the merged corporation as the net valuation of its assets bear to the total net valuation of the assets of the three companies; the stockholders of Farmers National Bank and Trust Co. of Reading shall jointly receive such proportion of the capital stock of the merged corporation as the net valuation of its assets bear [fol. 17] to the total net valuation of the assets of the three companies; and the stockholders of Penn National Bank and Trust Co. of Reading shall jointly receive such proportion of the capital stock of the merged corporation as the net valuation of its assets bear to the total net valuation of the assets of the three companies.

4. This agreement is made subject to the approval of the Comptroller of the Currency, and all other Governmental authorities whose consent will be required to comply with all legal requirements.

5. The Reading National Bank and Trust Company and Penn National Bank and Trust Company of Reading shall forthwith execute all necessary documents to transfer and assign all of their assets to Farmers National Bank & Trust Co. of Reading with the right to hypothecate and re-hypothecate any or all of such assets, but conditioned upon the assumption by Farmers National Bank & Trust Co. of Reading of all of the deposit liabilities of the companies as well as all other liabilities thereof, except liability to stockholders as such, reserving the right to collect from the stockholders of Reading National Bank and Trust Company and Penn National Bank and Trust Co. of Reading any liabilities which are owing or which may become owing by virtue of the ownership of their stock in the respective banks.

6. A meeting of the Board of Directors of Farmers National Bank and Trust Co. of Reading shall be held Friday, Feb. 17, 1933, at nine o'clock A. M. to elect proper executive officers to conduct the business at the Reading National Bank & Trust Co. branches and at the Penn National Bank [fol. 18] & Trust Co. of Reading branch of said Farmers National Bank & Trust Company of Reading.

7. All legal papers shall be subject to the approval of the Counsel of the Farmers National Bank and Trust Company of Reading.

8. This agreement shall bind the parties thereto, their successors and assigns.

Farmers National Bank & Trust Co. of Reading, by Ferdinand Thun, Chairman of Board; Chas. T. Cubellis, Asst. to President. Reading National Bank & Trust Company, by H. H. Harrison, President, W. G. Mast, Cashier. Penn National Bank & Trust Co. of Reading, by J. H. Hasbrouck, President, Jere Hess Barr, Secretary; I. F. Impink, H. F. Kantner, Committee.

EXHIBIT "B" TO COMPLAINT

Supplemental Agreement

This supplemental agreement entered into this 20th day of February, A. D. 1933, by and between Farmers National

Bank & Trust Company of Reading, Pa., of the first part, [fol. 19] Reading National Bank & Trust Company of Reading, of the second part, and Penn National Bank & Trust Company of Reading, state aforesaid, of the third part:

Whereas, the parties hereto entered into an agreement dated February 17th, 1933, and whereas the parties desire to supplement said Agreement,

Now, therefore, this agreement witnesseth

First, That the Penn National Bank and Trust Company of Reading, and The Reading National Bank & Trust Company of Reading hereby guarantee to the Farmers National Bank & Trust Company of Reading That the assets of their respective banks will in value exceed the deposit liability and other liabilities assumed by the Farmers National Bank & Trust Company of Reading, by virtue of said Agreement of Feb. 17, 1933.

This agreement is executed by the officers of each of said banks, they having been duly authorized by their respective Board of Directors.

Farmers National Bank & Trust Company of Reading, —— ——, President; —— ——, Cashier.
Reading National Bank & Trust Company of Reading, —— ——, President; —— ——, Cashier.
Penn National Bank & Trust Company of Reading, —— ——, President; —— ——, Cashier.

[fol. 20] EXHIBIT "C" TO COMPLAINT

Assessment upon Shareholders

Treasury Department

Office of the Comptroller of Currency

No. 2899

In the Matter of THE PENN NATIONAL BANK AND TRUST CO., Reading, Pennsylvania

Washington, D. C., January 15, 1935.

To All Whom It May Concern:

Whereas, upon a proper accounting by the Receiver heretofore appointed to collect the assets of The Penn

National Bank and Trust Company, of Reading, Pennsylvania, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed in Section 5151 and 5234 of the Revised Statutes of the United States, Section 1 c 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as Federal Reserve Act.

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said Penn National Bank and Trust Company, of Reading, Pennsylvania, for One Million ($1,000,000.) Dollars, to be paid by them on or before the 23rd day of February, 1935, and I hereby make demand upon each and every one of them for the par value of each and every share of capital stock of said association held or owned by them, respectively, at the time of its failure; and [fol. 21] I hereby direct Wm. H. McGowan, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In Witness whereof, I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this 15th day of January, A. D. 1935.

J. F. T. O'Connor, Comptroller of the Currency.
(Seal.)

IN UNITED STATES DISTRICT COURT

DUPLICATE ORIGINAL SUBPŒNA—Returned and Filed Mar. 5, 1935

The President of the United States of America to J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, Greeting:

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpœna at the Clerk's office of the United States District Court for the Eastern District of Pennsyl-

vania, at Philadelphia to answer unto the bill of complaint of Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Moyer in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable the United States District Judges [fol. 22] at Philadelphia this 23rd day of February A. D. 1935.

George Brodbeck, Clerk, by (S.) E. G. Johnson, Deputy Clerk. (Seal.)

— Memorandum

The Defendants in this case are required to file an answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

Return on Service of Writ

United States of America,
District of Columbia, ss:

I hereby certify and return, that on the 27th day of February, 1935, I received the within subpœna and served copy of the same, together with the bill of complaint in said case, on J. F. T. O'Connor, Comptroller of the Currency, by personal service of the same on Gibbs Lyons, Deputy Comptroller of the Currency, February 27, 1935.

(Sgd.) John B. Colpoy, United States Marshal, by (Sgd.) Harry Callen, Deputy United States Marshal.

In United States District Court

Motion to Dismiss Bill of Complaint—Filed March 8, 1935

Comes now the defendant William H. McGowan, Receiver of the Penn National Bank & Trust Company, and respect- [fol. 23] fully moves this Honorable Court to dismiss the bill of complaint filed herein, upon the following grounds:

1. The said bill of complaint does not state facts sufficient to entitle plaintiffs to any relief, there being no equity stated in the bill.

2. The said bill of complaint shows on its face that the levying of the assessment by the Comptroller of the Currency on the stockholders of the Penn National Bank and Trust Company, as to which relief is sought, was done in pursuance of the administrative jurisdiction, discretion and judgment of the Comptroller of the Currency, and that the Comptroller of the Currency, in so acting, exercised the official discretion vested in him by law in the premises, and that this Court should not disturb such discretionary acts.

3. The said bill of complaint seeks to attack the validity and effect of acts performed by administrative and executive officers of the Federal Government within the course of their official discretion and duty.

4. Upon the facts covered in said bill of complaint this Court, in exercising its discretion as to the injunctive relief sought, should deny such relief and dismiss the bill.

5. The bill of complaint states no cause of action against this defendant, nor are the averments thereof sufficient to entitle plaintiffs to the relief sought.

6. The bill of complaint is multifarious.

7. The averments of said bill, upon which the right to the relief sought is based, are merely statements of conclusion of law and of fact.

8. The said bill shows on its face that it constitutes a collateral attack on the validity of the stock assessment [fol. 24] levied by the Comptroller of the Currency in the course of his administrative discretion and authority.

9. The bill of complaint shows on its face that the stock assessment is valid and that the validity of such assessment can not be contested in this action.

10. The averments of said bill are to the effect that if certain alleged causes of action are pursued, or if certain alleged agreements are performed there will be no occasion or necessity for an assessment and that there will be sufficient to pay the creditors in full, all of which constitute conclusions of law and of fact, and further constitute an attempt to attack collaterally the finding by the Comptroller of insolvency of the bank and of the necessity for

an assessment, the determination of all of which matters is vested by law exclusively in the Comptroller, whose determination of such matters is not open to attack or to review by this Court under the facts averred in said bill of complaint.

11. The said bill of complaint shows upon its face that the acts and matters complained of, as to which relief is sought, were embraced within the exclusive official and administrative jurisdiction, discretion and control of the Comptroller of the Currency, and that the Comptroller in so acting exercised the official and administrative discretion vested in him by law in the premises, and that this Honorable Court is precluded from reviewing or disturbing the findings, conclusions and acts of the Comptroller of the Currency in such matters.

12. That said bill shows on its face that the plaintiffs have been guilty of laches.

13. That if such alleged merger had been effected the stockholders of the Penn National Bank and Trust Company would not have been legally entitled to notice, as is [fol. 25] suggested in said bill of complaint (paragraph 19).

14. The bill of complaint shows on its face that this was not a legal consolidation under the Act of November 7, 1918, as amended, requiring the Comptroller's certificate of approval, nor does said bill show that the Comptroller was a party to said alleged merger, or that he authorized or consented to it, or that he ratified it, or that he officially or otherwise approved it.

15. And for other and further reasons apparent in said bill of complaint.

Harry R. Matten, Charles W. Matten, Charles C. Wainwright, Attorneys for Defendants.

STATE OF PENNSYLVANIA,
County of Berks, ss:

William H. McGowan being duly sworn according to law, deposes and says that he is one of the defendants in the above case and that the foregoing Motion to Dismiss Bill

of Complaint is not made for delay but because he verily believes complainants have no legal cause of action.

William H. McGowan.

Sworn and subscribed to before me this Seventh day of March, A. D. 1935. Kathryn G. Sauer, Notary Public. My commission expires March 5, 1937. (Seal.)

[fol. 26] IN UNITED STATES DISTRICT COURT

MOTION TO QUASH PROCESS—Filed March 8, 1935

Comes now J. F. T. O'Connor, as Comptroller of the Currency, defendant in the above entitled cause, by his attorneys, appearing solely for the purpose of challenging the jurisdiction of the Court over said defendant and for no other purpose, and respectfully moves this Honorable Court to quash and subpœna and process issued in this cause on February 23, 1935, pursuant to which said defendant was served by the United States Marshal in and for the District of Columbia on February 27, 1935, and to dismiss said bill of complaint as to this defendant, upon the following grounds:

1. Service of process was not had on said defendant in the Eastern District of Pennsylvania.

2. Service of process on said defendant was not made by the United States Marshal for and in the Eastern District of Pennsylvania.

3. The said defendant is not an inhabitant or resident of the Eastern District of Pennsylvania within the purview of Title 28, Section 112 United States Code Annotated, which requires all civil suits to be brought in the district court of the district whereof the defendant is an inhabitant.

4. And for other reasons apparent of record.

Charles E. Wainwright, Harry R. Matten, Charles W. Matten, Attorneys for Defendant J. F. T. O'Connor, Comptroller of the Currency.

[fol. 27] IN UNITED STATES DISTRICT COURT

APPEARANCE—Filed March 8, 1935

To the District Court of the United States for the Eastern District of Pennsylvania:

The Clerk of this Court will please enter our appearance de bene esse as attorneys for J. F. T. O'Connor, Comptroller of the Currency of the United States.

(Sgd.) Chas. W. Matten, Harry R. Matten, Attorneys for J. F. T. O'Connor, Comptroller of the Currency.

Dated March 8, 1935.

To George Brodbeck, Clerk.

IN UNITED STATES DISTRICT COURT

OPINION SUR MOTION TO DISMISS BILL OF COMPLAINT—Filed May 1, 1935

This suit in equity is an effort upon the part of stockholders of a closed National Bank to avoid meeting their statutory liability. The bill of complaint discloses nothing which takes the case out of the well established rule, which has been the basis of scores of decisions, that the determination made by the Comptroller of the Currency as to the insolvency of a bank and the necessity for an assessment are administrative matters to be determined by him and not ordinarily reviewable by the Court. See Wilson vs. Awalt, 2 Fed. Sup. 465, and cases there cited.

[fol. 28] The bill alleges fraud, but it is elementary that general charges of fraud are not sufficient unless the facts pleaded show that the transactions to which the epithet is applied are actually fraudulent. Wanamaker vs. Edisto Bank, 62 Fed. (2nd) 696.

The right to proceed against stockholders to collect the assessment is committed to the receiver. It will be noted that there is nothing in the Statute (U. S. C. Title 12, Sections 191-192) which requires preliminary action by the Comptroller except the general words "under the direction of the Comptroller" which appear in Section 192. From

an early date however the courts have read into the act the requirement that the receiver's action must be preceded by a determination by the Comptroller of the necessity for and the amount of the assessment. See Kennedy vs. Gibson, 74 U. S. 498, 505. Bank vs. Kennedy, 17 Wall. 19.

The plaintiffs rely upon a dictum in the opinion in U. S. vs. Knox, 102 U. S. 422 which they interpret as meaning that if the comptroller, in ascertaining the amount of the assessment, fails to take into consideration ("exhaust") all the assets of the bank, a court of equity will act by injunction to restrain subsequent proceedings. Whatever may have been intended by this statement, it is perfectly clear from the later decisions that it was never meant that the stockholders could institute an inquiry into the correctness of the Comptroller's determination, and proceed to fix the amount of their liability as on an accounting, by a proceeding in equity, pending which, suits are to be stayed. Such interpretation would utterly defeat the whole purpose of the policy involved which is to "expeditiously and justly wind up the affairs and the paying of debts of National [fol. 29] Banks". Kerby vs. Springfield Inst. etc., 245 U. S. 330, 333. Miller vs. Stock, 85 Fed. 2nd 773.

But, beyond all this, even if the right of the plaintiffs to attack the Comptroller's determination in this proceeding were to be conceded to the full extent claimed (which obviously it cannot be) and assuming that the bill is intended as a direct attack upon the Comptroller's action based on fraud, excess authority, error of law or anything else that the plaintiffs claim would invalidate that action, the facts alleged by the bill entirely fail to show any ground for relief. What happened, as averred in the bill, was that when the bank was closed and a conservator appointed, its assets had already been sold and transferred to another bank (Farmers National Bank) which in turn had agreed to pay all the deposit liabilities of the former. Thus, the only asset it had was this obligation of the Farmers National Bank. It will be noted that the bill avers that the assets transferred were worth some $350,000 in excess of the deposit liabilities.

Now, says the bill, the Comptroller, without legal right, disregarded this state of affairs, rescinded the contract and, in determining the bank's financial condition, allotted to it twenty-five per cent of all the assets held by the Farmers Bank, representing the combined resources of

three merged banks. In other words, in making the determination the Comptroller balanced the deposit liabilities of the bank against twenty-five per cent of a certain pool of assets (value not stated) instead of balancing them against the obligation of the Farmers Bank to pay them. No one can tell from the bill what the value of that obligation was, nor does it appear how much the alleged arbitrary allocation of assets amounted to. The only thing that does [fol. 30] appear is that the deposit liabilities were $5,100,000.

Granted that the Comptroller should have taken the situation as it existed when the Bank closed instead of proceeding to undo and unscramble the assets, there is absolutely nothing to show that, as a matter of assets and liabilities, these stockholders have suffered by the method adopted by the Comptroller. Whether the agreement of the Farmers Bank to pay deposit liabilities was worth more or less than the assets which were allocated in its place is not shown. Inferentially, it would not appear to have been worth its face value since the Farmers Bank was also in receivership and is now in process of reorganization.

The conclusion is that under any view the bill must be dismissed.

This conclusion makes it unnecessary to pass upon the motion to quash process served upon the Comptroller.

By the Court.

(Sgd.) W. H. Kirkpatrick, J.

IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO FILE AMENDMENT TO BILL OF COMPLAINT—Filed May 29, 1935

And now, to wit, this 29th day of May A. D., 1935, come the plaintiffs, by their attorneys, and move the Court for leave to amend their Bill of Complaint, as follows:

1. By adding a new paragraph after Paragraph 14, and before Paragraph 15 of the Bill, to be designated as Paragraph 14 a, to read as follows:

14 (a) At the time of the execution of said agreement of February 17, 1933, the assets of said Farmers' National

[fol. 31] Bank were of a nature similar in character to those of said Penn National Bank, and had a book value of approximately $9,500,000., which after a deduction for depreciation of approximately $1,500,000., represented a fair and reasonable net market value of approximately $8,000,000., as against liabilities to creditors of approximately $9,000,000., and a liability to stockholders on its capital stock of $1,000,000; that the general claim of said Penn National Bank under said Agreement of February 17, 1933, included not only the obligation of said Farmers National Bank to said Penn National Bank and to the depositors and other creditors of said Penn National Bank, and also the liability of the stockholders of said Farmers National Bank to assessment on the capital stock of $1,000,000., but in addition the assets of said Penn National Bank transferred and delivered to Farmers National Bank as aforesaid, and the commingled assets of said Penn National Bank and Farmers National Bank, were subject to an equitable lien and charge in favor of said Penn National Bank and its creditors, and constituted a trust fund for their benefit, and the said general claim of the said Penn National Bank against the Farmers National Bank as thus constituted was then and now is more than sufficient in the ordinary course of liquidation to pay and discharge all liabilities of said Penn National Bank without the necessity of any assessment upon the stockholders of the Penn National Bank.

2. By striking out the following words in Paragraph 19 of the Bill: "and a division of the proceeds on the basis of 35% to Farmers National Bank, 25% to Penn National [fol. 32] Bank, and 25% to Reading National Bank," and in lieu thereof to insert "in consideration for which the new National Bank was to establish on its books lump sum credits for the benefit of the Conservator of each of said banks in an amount sufficient to permit a distribution to be made to the depositors and other creditors of each of said banks in the following percentages of the claims against each of said banks, 35% to Farmers National Bank, 25% to Penn National Bank and 25% to Reading National Bank."

(Sgd.) George C. Eaves, Stevens and Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Plaintiffs.

And now, to wit, this — day of —— A. D., 1935, in consideration of the foregoing Motion, the Court grants leave to the plaintiffs to amend their Bill as therein stated.

IN THE UNITED STATES DISTRICT COURT

STIPULATION RE MOTION TO DISMISS—Filed September 9, 1935

It is hereby stipulated by and between the above-entitled parties, by their respective attorneys, that the motion to dismiss the original bill of complaint heretofore filed in the above entitled cause shall stand and be adopted and con- [fol. 33] sidered in all respects as a motion to dismiss the amended bill of complaint herein.

(Sgd.) George Eaves, Attorney for Plaintiffs. (Sgd.) Charles E. Wainwright, Attorney for Defendants.

IN THE UNITED STATES DISTRICT COURT

OPINION SUR MOTION TO AMEND BILL OF COMPLAINT, MOTION TO QUASH PROCESS AND REARGUMENT SUR MOTION FOR PRELIMINARY INJUNCTION—Filed June 25, 1935

Before W. H. KIRKPATRICK, J.

The allowance of amendments was urged upon grounds which amounted in substance to a request to supply matter inadvertently omitted by the pleader. The plaintiff ought to have the benefit of all the facts which he can properly aver. The amendments will be allowed. However they do not affect in the slightest degree the conclusion reached by the Court.

It may be that the remarks contained in the latter part of the opinion filed would not apply to the amended bill, and they may be disregarded. The amendments however merely emphasize the thought expressed in the fourth paragraph of the opinion—namely, that relief asked for necessarily depends upon an immensely complicated accounting by the Court in this proceeding to determine the question whether the Penn Bank was or was not really solvent at the time of the Comptroller's determination—a proceeding which ob-

viously involves countless questions not only of fact but of [fol. 34] law. For example the assets transferred to the Farmers National Bank would have to be valued; the assets and liabilities of the Farmers Bank itself would have to be considered in order to determine how much its alleged agreement to assume the deposit liabilities of the Penn Bank was worth; the agreement itself would have to be construed and the legal question whether or not it created an equitable lien in favor of the Penn Bank in the transferred assets would have to be determined.

The whole basis of the bill is that the Comptroller's determination of the necessity for an assessment was incorrect. Admittedly, if the bank was insolvent the Comptroller's determination was a correct one, no matter by what process he arrived at it. The quasi-contractual liability which the law imposes upon holders of stock of a national bank includes the liability to assessment if and when the Comptroller exercising his discretion, without fraud, determines that an assessment is necessary. The financial condition of the bank can never be estimated accurately except by the process above referred to and it is not the stockholders' right to demand this proceeding until the time for it arrives in the final winding up of the bank's affairs. To do so now, and to stay suits pending the result would be to reverse the whole system set up by the legislation upon this point and to destroy its efficacy as a means of promptly collecting the bank's assets so that they can be applied to its debts.

I did not dispose of the motion to quash the process because, in view of the fact that the bill was dismissed, I thought it unnecessary. However, both parties wish this motion disposed of. Under the authority of Wilson vs. Awalt, 2 Fed. Sup. 465, the writ will be quashed.

[fol. 35] In United States District Court

Order Sustaining Motion to Dismiss and Denying Motion for Preliminary Injunction—Filed June 25, 1935

This cause coming on to be heard on April 15, A. D. 1935, on motion of defendant J. F. T. O'Connor, as Comptroller of the Currency to quash service of subpœna and process, and upon motion of the defendant William H. Mc-

Gowan as Receiver of the Penn National Bank and Trust Company of Reading, to dismiss plaintiffs' bill of complaint and upon motion of plaintiffs for preliminary injunction, and further coming on to be heard on May 29, 1935, and on June 17, 1935, on motion for leave to amend the original bill of complaint herein, and said motions having been argued respectively by counsel in open court and upon consideration thereof, it is by the Court this 25th day of June, A. D. 1935

Ordered, adjudged, and decreed, that said motion for leave to amend the original bill of complaint herein, be and the same hereby is granted, and that said motion to quash service of subpœna and process on defendant J. F. T. O'Connor, Comptroller of the Currency be and the same hereby is sustained, and that said motion to dismiss plaintiffs' amended bill of complaint be and the same hereby is sustained, and that plaintiffs' amended bill of complaint filed herein be dismissed as to both defendants, and that defendants recover their proper costs and that plaintiffs be adjudged to pay all proper costs incurred by said defendants in this cause, for which let execution issue; and it is further

Ordered, adjudged and decreed, that plaintiffs' motion [fol. 36] herein for a preliminary injunction be and the same hereby is denied.

(Sgd.) W. H. Kirkpatrick, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER DIRECTING THAT OPINION OF COURT STAND AS ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 22, 1935

And now, to wit July 20, 1935, on motion of the above-named plaintiffs, it is Ordered that the opinions of this Court rendered in the above-entitled suit on the motion to dismiss, the bill of complaint herein, and the motion to quash the subpœna and set aside the service thereof, may stand as the findings of fact and conclusions of law in accordance with the provisions of Equity Rule 70½.

(Sgd.) W. H. Kirkpatrick, J.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING AMENDMENTS TO BILL OF COMPLAINT NUNC PRO TUNC AS OF JUNE 25, 1935—FILED AUGUST 5, 1935

And now, to wit, July 31, 1935, on consideration of the motion of plaintiffs for leave to file amendments to the bill of complaint herein as therein stated, said motion is granted, and said proposed amendments shall stand as amendments to said bill of complaint nunc pro tunc as of June 25, 1935.

(Sgd.) W. H. Kirkpatrick, United States District Judge.

[fol. 37] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—FILED AUGUST 5, 1935

Now come the plaintiffs in the above entitled cause and file the following assignments of error upon which they rely in the prosecution of their appeal in the above entitled cause from the Order and Decree made and entered by this Honorable Court on the 25th day of June, 1935.

1. The Court erred in sustaining the motion to dismiss the Bill of Complaint herein by deciding that the facts alleged do not entitle plaintiffs to relief.

2. The Court erred in sustaining the motion to quash service of process on the Comptroller of the Currency by deciding that the suit was brought by individuals and not by a national bank.

3. The Court erred in its conclusion as follows: (Supp. Op. par. 3)

"The whole basis of the bill is that the Comptroller's determination of the necessity for an assessment was incorrect."

4. The Court erred in not holding that the determination by the Comptroller as to the propriety and amount of an assessment on stockholders is subject to a direct attack by a suit in equity where such determination is beyond the authority of the Comptroller, violates the requirements of due process, or is arbitrary and capricious.

5. The Court erred in not holding that the determination by the Comptroller as to the propriety and amount of an assessment, is subject to the condition precedent that the ordinary resources of the bank be first exhausted, and a deficit thereby established.

6. The Court erred in not finding that the only and or- [fol. 38] dinary resources of the bank consisted of its rights under a valid contract with the Farmers' Bank covering the transfer of all assets to, and the assumption of all liabilities by, the Farmers' Bank, that said resources were more than sufficient in the ordinary course of liquidation to pay and discharge all liabilities without the necessity of an assessment, that such resources had not been exhausted, and that no deficit in fact existed.

7. The Court, in failing to assume as true the facts properly alleged in the Bill of Complaint and amendments thereto, erred in its conclusion as follows: (Supp. Op. par. 2)

"The amendments however merely emphasize the thought expressed in the fourth paragraph of the opinion—namely that relief asked for necessarily depends upon an immensely complicated accounting by the Court in this proceeding to determine the question whether the Penn Bank was or was not really solvent at the time of the Comptroller's determination—a proceeding which obviously involves countless questions not only of fact but of law. For example the assets transferred to the Farmers National Bank would have to be valued; the assets and liabilities of the Farmers' Bank itself would have to be considered in order to determine how much its alleged agreement to assume the deposit liabilities of the Penn Bank was worth; the agreement itself would have to be construed and the legal question whether or not it created an equitable lien in favor of the Penn Bank in the transferred assets would have to be determined."

8. The Court erred in not finding that the Comptroller without right or authority prior to the assessment made a [fol. 39] ruling abrogating the valid contract between the bank and the Farmers' Bank and all rights thereunder, under which ruling the said contract and all rights thereunder were abandoned as assets of the bank without any

attempt to enforce, collect or value the same, and were ignored and disregarded in the making of the assessment by the Comptroller.

9. The Court erred in not holding that the assessment by the Comptroller was beyond his authority, violated the requirements of due process and was arbitrary and capricious.

10. The Court erred in its conclusion that the Bill of Complaint alleged fraud in general terms.

11. The Court erred in its conclusion as follows: (Supp. Op., par. 3)

"Admittedly, if the bank was insolvent the Comptroller's determination was a correct one, no matter by what process he arrived at it."

12. The Court erred in its conclusion as follows: (Supp. Op. Par. 3)

"The financial condition of the bank can never be estimated accurately except by the process above referred to and it is not the stockholders' right to demand this proceeding until the time for it arrives in the final winding up of the bank's affairs."

Wherefore the appellants pray that said decree be reversed and for such other and further relief as may be proper.

George Eves, John B. Stevens, Harry W. Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Appellants, by Lemuel [fol. 40] B. Schofield.

August 5th, 1935.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed August 5, 1935

To the Honorable Judges of the Said Court:

The above-named plaintiffs feeling aggrieved by the decree rendered and entered in the above entitled cause on the 25th day of June, 1935 do hereby appeal from said decree to the Circuit Court of Appeals for the Third Cir-

cuit for the reasons set forth in the assignments of error filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit, under the rules of said court in such cases made and provided.

And your petitioners further pray that the proper order relating to the security to be required of them be made.

George Eves, Stevens and Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Petitioners, (Sgd.) by Lemuel B. Schofield.

August 5th, 1935.

ORDER ALLOWING APPEAL

Appeal allowed upon giving bond in the sum of $250., to be approved by the Clerk of the District Court, conditioned [fol. 41] for the payment of costs on appeal.

(Sgd) O. B. Dickinson, *J.*

August 9, 1935.

IN UNITED STATES DISTRICT COURT

CITATION—Filed August 9, 1935

UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States, Eastern District of Pennsylvania, wherein Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Moyer, are appellants,

and you are appellees to show cause, if any there be, why the Decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable O. B. Dickinson, Judge of the District Court of the United States, this 9th day of August, in the year of our Lord one thousand nine hundred and thirty-five.

O. B. Dickinson, District Judge.

STIPULATION

It is hereby stipulated by and between Stevens & Lee, [fol. 42] Edw. D. Trexler, W. Bradley Ward, George Eaves, and Lemuel B. Schofield, Attorneys for the appellants in the above entitled cause, and Charles E. Wainwright, attorney for appellee, that service of citation on appeal dated August 9, 1935, is accepted as to the appellee J. F. T. O'Connor, Comptroller of the Currency of the United States, for the sole and only purpose of permitting a review on appeal of the action of the Trial Court in sustaining a motion of appellee O'Connor to quash service of subpoena and process.

It is further stipulated by and between Counsel for appellants and appellee that the service of said citation on appellee, so far as the appellee O'Connor is concerned, is not to be construed as permitting a review of the case on the merits, and the acceptance of such service is to be limited to the purposes above stated, and no other.

(Sgd.) Stevens & Lee, Edw. D. Trexler, Geo. Eaves, W. Bradley Ward, Lemuel B. Schofield, (Sgd.) Charles E. Wainwright, Attorney for Appellee.

IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER OF CONSOLIDATION—Filed August 9, 1935.

It is hereby stipulated and agreed by and between the attorneys for the respective parties that the appeals in the above entitled suits be and the same are hereby consolidated,

and that a joint record shall be printed, and that an order [fol. 43] may be entered to that effect without any further notice.

George Eves, John B. Stevens, Harry W. Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Appellants, by (Sgd.) Lemuel B. Schofield, Chas. W. Matten, Chas. Wainwright, Attorneys for Appellees.

August 9th, 1935.

ORDER

Before DICKINSON, J.

It is ordered by this Court that Cause No. 8525 In Equity entitled Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Moyer, Plaintiffs vs. J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, Defendants, and Cause No. 8527 In Equity, entitled J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith, Plaintiffs vs. J. F. T. O'Connor, Comptroller of The Currency and Harvey S. Adams, Receiver of Reading National Bank and Trust Company of Reading, Defendants, be and the same are hereby consolidated for the purpose of appeal, and that a joint record may be printed.

By the Court;
Attest:

Leo A. Lilly, Deputy Clerk.

August 9, 1935.

[fol. 44] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR RECORD—Filed September 9, 1935

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Third Circuit, pursuant to an appeal allowed in the above entitled proceedings, and to include in such transcript the following:

1. Bill of Complaint.
2. Duplicate Original Subpoena.
3. Return of Service of Duplicate Original Subpœna.
4. Motion to Dismiss Bill of Complaint.
5. Motion by J. F. T. O'Connor, Comptroller to Quash Subpœna.
6. Appearance de bene esse of Charles W. Matten and Harry R. Matten for J. F. T. O'Connor, Comptroller.
7. Opinion, Kirkpatrick, J., dismissing Bill of Complaint.
8. Motion for leave to file Amendment to Bill of Complaint with proposed amendment.
9. Stipulation of counsel regarding motion to dismiss amended bill of complaint.
10. Opinion, Kirkpatrick, J., granting leave to amend Bill and Granting Motion to Quash Process.
11. Decree of June 25, 1935, granting leave to amend Bill, granting Motion to Quash Service of Process, denying Motion for Preliminary Injunction and dismissing Bill of Complaint with costs.
12. Order of Court directing that Opinions of Court stand as its findings of fact and conclusions of law.
[fol. 45] 13. Order of Court allowing Amendments to Bill of Complaint nunc pro tunc.
14. Assignments of Error.
15. Petition for Appeal and Order allowing same.
16. Citation on Appeal and Acknowledgment of Service.
17. Stipulation of counsel regarding appellee J. F. T. O'Connor, Comptroller of the Currency.
18. Docket Entries.
19. Praecipe for Transcript.
20. Certificate of Clerk

and file said transcript with the Clerk of the United States Circuit Court of Appeals for the Third Circuit.

(Sgd.) George Eves, John B. Stevens, Harry W. Lee, Edward D. Trexler, W. Bradley Ward, (Sgd.) Lemuel B. Schofield, Attorneys for Appellants.

Aug. 26, 1935.

We hereby acknowledge receipt of a copy of the Praecipe for Record of which this is the original.

(Sgd.) Chas. W. Matten, Charles E. Wainwright, Attorneys for Appellees.

August 27, 1935.

[fol. 46] In United States District Court for the Eastern District of Pennsylvania, December Term, 1934

No. 8527

J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith

vs.

J. F. T. O'Connor, Comptroller of the Currency, and Harvey S. Adams, Receiver of Reading National Bank & Trust Company of Reading

Docket Entries

Feb. 23, 1935. Bill of Complaint filed.

Feb. 23, 1935. Subpoena exit—returnable March 15, 1935.

Feb. 23, 1935. Duplicate original subpoena exit—returnable March 15, 1935.

Mar. 5, 1935. Subpoena returned "Served on February 27, 1935" and filed.

Mar. 5, 1935. Duplicate original subpoena returned "Served on February 27, 1935" and filed.

Mar. 8, 1935. Motion by H. S. Adams to dismiss Bill of Complaint filed.

Mar. 8, 1935. Appearance of Chas. W. Matten and Harry R. Matten Esqs. for H. S. Adams, Receiver etc. filed.

Mar. 8, 1935. Motion by J. F. T. O'Connor, Comptroller etc. to quash subpoena, filed.

Mar. 8, 1935. Appearance de bene esse of Charles W. Matten and Harry R. Matten, Esqs. for J. F. T. O'Connor, Comptroller etc. filed

[fol. 47] Mar. 9, 1935. Affidavit of service of copies of motion to dismiss and motion to quash etc. filed.

Apr. 15, 1935. Argued sur motions to quash service of writ; to dismiss bill of complaint; and for preliminary injunction.

May 6, 1935. Memorandum Opinion, Kirkpatrick J., dismissing Bill filed.

May 29, 1935. Motion for leave to file amendment to bill of complaint filed.

June 17, 1935. Argued sur motion to amend.

June 25, 1935. Memorandum Opinion, Kirkpatrick J., sur motion to amend bill and motion to quash service of process filed.

June 25, 1935. Decree granting leave to amend bill, grant-

DOCKET ENTRIES—Continued

ing motion to quash service of process, denying motion for preliminary injunction and dismissing bill of complaint with costs filed.

July 22, 1935. Order of Court directing that opinion of Court stand as its findings of fact and conclusions of law filed.

Aug. 5, 1935. Order of Court allowing amendment to bill of complaint nunc pro tunc as of June 25, 1935, filed.

Aug. 5, 1935. Assignments of error filed.

Aug. 5, 1935. Petition for appeal filed.

Aug. 9, 1935. Order of Court allowing appeal filed.

Aug. 9, 1935. Bond for costs sur appeal in $250.00 with Standard Accident Insurance Co. surety and Order approving bond filed.

Aug. 9, 1935. Copy of notice of appeal filed.

Aug. 9, 1935. Citation allowed and issued.

Aug. 9, 1935. Stipulation of counsel and Order of Court [fol. 48] consolidating this case with cause #8525 for purpose of appeal filed.

Sept. 9, 1935. Citation returned "service accepted" and filed.

Sept. 9, 1935. Præcipe for transcript of record sur appeal filed.

IN UNITED STATES DISTRICT COURT

BILL OF COMPLAINT—February 23, 1935

To the Honorable the Judges of Said Court:

J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith, citizens of the State of Pennsylvania, residing in the County of Berks in said State, bring this their Bill of Complaint on their own behalf and on behalf of all other stockholders of Reading National Bank and Trust Company of Reading, who may become parties to and join in the prosecution of this suit, and contribute to the expense thereof, against J. F. T. O'Connor, Comptroller of the Currency, and Harvey S. Adams, Receiver of Reading National Bank and Trust Company of Reading, and say:

1. The ground upon which the jurisdiction of this Court depends is that this is a suit in equity for winding up the

affairs of a national bank, and is brought by stockholders on a cause of action enuring to a national bank established in this District, under the provisions of the National Bank Act, to enjoin the Comptroller of the Currency and a Receiver acting under his directions as provided by said National Bank Act.

2. Plaintiffs are citizens of the United States residing in the County of Berks in the State of Pennsylvania, and are stockholders of Reading National Bank and Trust Com-
[fol. 49] pany of Reading, a national banking association organized and existing under and by virtue of the banking laws of the United States, having prior to February 18, 1933 been engaged in general banking business, with principal office and place of business in the City of Reading, County of Berks and State of Pennsylvania.

3. The capital stock of said Reading National Bank and Trust Company of Reading consists of 60,000 shares of the par value of $10.00 each, and there are approximately 500 shareholders, including plaintiffs, which constitute a class so numerous as to make it impracticable to bring them before this Court and join them in this suit in which the question to be determined is one of common and general interest to all of said class involving the identical points of fact and law, for which reason plaintiffs bring this suit on behalf of all of such class.

4. Defendant, J. F. T. O'Connor, is Comptroller of the Currency, in the Treasury Department of the United States, and a resident and inhabitant of the City of Washington in the District of Columbia.

5. Harvey S. Adams, is Receiver of said Reading National Bank and Trust Company of Reading by appointment of the Comptroller of the Currency dated October 27, 1934, and is a resident and inhabitant of the City of Reading, County of Berks and State of Pennsylvania.

6. On February 17, 1933 said Reading National Bank and Trust Company of Reading, hereinafter referred to as Reading National Bank, and Penn National Bank and Trust Company of Reading, hereinafter referred to as Penn National Bank, entered into an agreement with Farmers Na-
[fol. 50] tional Bank and Trust Company of Reading, hereinafter referred to as Farmers National Bank, national

banking associations organized and existing under and by virtue of the banking laws of the United States being then engaged in general banking business with principal offices and places of business in the City of Reading, County of Berks and State of Pennsylvania, wherein among other things, Reading National Bank and Penn National Bank in contemplation of a consolidation with Farmers National Bank agreed forthwith to transfer and assign all of their assets to Farmers National Bank with the right to hypothecate and rehypothecate any or all of such assets, but conditioned upon the assumption by Farmers National Bank of all the deposit liabilities as well as all other liabilities of said Reading National Bank and Penn National Bank excepting liabilities to stockholders as such, which agreement was duly accepted by said Farmers National Bank. A true and correct copy of said agreement is hereto attached, made part hereof and marked Exhibit "A".

7. On February 20, 1933 at the direction of the Comptroller of the Currency, said Reading National Bank together with Penn National Bank entered into a supplemental agreement with Farmers National Bank wherein said Reading National Bank and Penn National Bank guaranteed to the Farmers National Bank that the assets of their respective banks would in value exceed the deposit liability and other liabilities assumed by said Farmers National Bank by virtue of said agreement of February 17, 1933. A true and correct copy of said supplemental agreement is hereto attached, made part hereof, and marked Exhibit "B".

8. Prior to and at the time of the execution of said agree- [fol. 51] ment of February 17, 1933, said Reading National Bank was subjected to unusual withdrawals of deposit, resulting in a reserve deficiency and placing it on the verge of insolvency and because of such emergency the Board of Directors of said bank by resolution duly authorized the execution of said agreement of February 17, 1933 and the supplemental agreement of February 20, 1933.

9. On February 17, 1933 said Reading National Bank and Penn National Bank transferred and delivered to said Farmers National Bank all their assets, surrendered complete control and possession thereof, as well as their business, and in accordance with the provisions of said agree-

ment said Farmers National Bank appointed executive officers to conduct its business at the former places of business of said Reading National Bank and Penn National Bank under the designation of branches of said Farmers National Bank and thereafter with the knowledge, approval and acquiescence of the Comptroller of the Currency, his agents and representatives, ceased to exercise any control or dominion over their former assets and ceased to transact any business whatsoever.

10. At the time of the execution of said agreement of February 17, 1933, and the transfer and delivery of all of the assets to said Farmers National Bank, the assets of said Reading National Bank covered by said agreement and transferred and delivered as aforesaid consisted of cash on hand and due from banks, securities, loans and discounts, mortgage loans, real estate and other assets, of a value in excess of the liabilities assumed by said Farmers National Bank under said agreement of February 17, 1933 and February 20, 1933.

11. At the time of the execution of said agreement of [fol. 52] February 17, 1933, and the transfer and delivery of all the assets of said Reading National Bank to Farmers National Bank, the deposit liability together with all other liabilities of said Reading National Bank which were assumed by said Farmers National Bank consisting of demand deposits, time deposits, items due to bank, bills payable and rediscounts and all other liabilities, amounted to approximately $9,000,000.

12. Said Reading National Bank under said agreement of February 17, 1933, transferred and delivered to Farmers National Bank assets having a fair and reasonable value in excess of the deposit liability and all other liabilities of said Reading National Bank assumed by the Farmers National Bank, and said Reading National Bank duly performed and complied with all the terms and provisions of said agreement of February 17, 1933 and the supplemental agreement of February 20, 1933, by which said Reading National Bank guaranteed that its assets in value would exceed its deposit and all other liabilities assumed by said Farmers National Bank.

13. Under the terms and provisions of said agreement of February 17, 1933, and its due performance, as well as

the due performance of said supplemental agreement of February 20, 1933, said Farmers National Bank became liable to said Reading National Bank for the payment of all of its deposit liability and all other liabilities of said Reading National Bank, except liabilities to stockholders as such in the total amount of approximately $9,000,000, as well as liable to all depositors and other creditors of said Reading National Bank for the amounts of their respective claims.

14. Immediately upon the execution of said agreement [fol. 53] of February 17, 1933, said Farmers National Bank, with its combined resources and liabilities comprising its own original resources and liabilities and those derived from said Reading National Bank and Penn National Bank, carried on and conducted its regular banking business, commingled all its assets regardless of their source or origin and used the same indiscriminately in the conduct of its business and in the discharge of its obligations whether original or assumed.

15. On March 18, 1933, the Acting Comptroller of the Currency certified that said Farmers National Bank was unable to transact and carry on its ordinary banking business, or to exercise its usual banking functions without prejudicing the rights of depositors and other creditors, and that he deemed it necessary to take immediate steps in order to conserve the assets of said bank for the benefit of depositors and other creditors, and thereupon appointed Wellington M. Bertolet, Conservator of said Farmers National Bank under the provisions of the Conservation Act of March 9, 1933.

16. Thereupon and on or about March 20, 1933, said Wellington M. Bertolet as such conservator, under the direction of the Comptroller of the Currency, took possession of the books, records and assets of every description of said Farmers National Bank, which included not only the original books, records and assets of said bank, but those acquired by said bank under the terms of said agreement of February 17, 1933, from said Reading National Bank and Penn National Bank, and thereafter said Wellington M. Bertolet as such conservator of said Farmers National Bank pursuant to his duty as such administered all the assets of said Farmers National Bank including the assets [fol. 54] which had been derived by said Farmers National

Bank from said Reading National Bank and Penn National Bank.

17. On or about October 10, 1933, said J. F. T. O'Connor, Comptroller of the Currency, without notice of any kind to said Reading National Bank, its depositors and other creditors, or the stockholders thereof, and without a hearing, and without warrant or authority of law or a decree or order of any Court of competent jurisdiction, made a ruling to the effect that said agreement of February 17, 1933 and February 20, 1933 were without legal effect, and directed that the transfer and delivery of assets and the assumption of liabilities thereunder should be disregarded, and attempted to allocate among the Farmers National Bank, Reading National Bank and Penn National Bank assets transferred and delivered theretofore to said Farmers National Bank.

18. Said defendant, J. F. T. O'Connor, Comptroller of the Currency, in pursuance of said ruling, thereupon under date of October 10, 1933, certified that said Reading National Bank and Penn National Bank were unable to transact and carry on their ordinary banking business, or to exercise their usual banking functions without prejudicing the rights of depositors and other creditors, and that he deemed it necessary to take immediate steps for the benefit of the depositors and other creditors thereof, and thereupon appointed Wellington M. Bertolet as conservator of the Reading National Bank, and said Wellington M. Bertolet as conservator of Penn National Bank, under the provisions of the Conservation Act of March 9, 1933.

19. Under the date of October 29, 1933, said defendant, J. F. T. O'Connor, Comptroller of the Currency, proposed a [fol. 55] so-called plan of reorganization of said Farmers National Bank, Reading National Bank and Penn National Bank, based upon his said ruling, providing for the organization of a new national bank and the issuance of stock and securities, a pledge of assets to secure a loan from the Reconstruction Finance Corporation, and a sale of the assets to the new national bank, and a division of the proceeds on the basis of 35% to Farmers National Bank, 25% to Reading National Bank and 25% to Penn National Bank, which division was arbitrary and based on a classification adopted from the report of the National Bank Examiners of April

24, 1933, and not on the basis of the financial condition of said banks as of the date of the execution of said agreement and the transfer of assets and assumption of liability thereunder, to wit, February 17, 1933.

20. Said Wellington M. Bertolet, as conservator of each of said banks, each of which had interest adverse to each other, in furtherance of the so called plan of reorganization arbitrar-y reconstructed the assets and liabilities of each of said banks as of April 24, 1933, made an arbitrary division thereof among each of said banks, made a sale in gross of certain assets and apportioned the proceeds thereof under the prearranged schedule of 35% to Farmers National Bank, 25% to Reading National Bank and 25% to Penn National Bank.

21. Said Wellington M. Bertolet as conservator of each of said banks, pursuant to instructions of, and in accordance with said ruling of said defendant, J. F. T. O'Connor, Comptroller of the Currency, abrogating said agreements of February 17, 1933 and February 20, 1933, and all rights and obligations thereunder, ignored and disregarded the claims [fol. 56] of Reading National Bank in the amount of approximately $9,000,000 against said Farmers National Bank in the reconstruction of the financial condition of said banks, upon which the so called plan of reorganization was based.

22. Said ruling of said defendant, J. F. T. O'Connor, Comptroller of the Currency, and his acts thereunder abrogating said agreements of February 17, 1933 and February 20, 1933, and all the rights and obligations accrued thereunder was beyond the powers conferred upon him under the National Bank Act or other statutory law, was an unlawful assumption of judicial powers neither delegated to him by statute nor capable of being delegated, and was in violation of the rights of said Reading National Bank, its depositors and other creditors and stockholders thereof, and deprived them of their property without due process of law.

23. After the completion of the so-called plan of reorganization of the three banks, said defendant, J. F. T. O'Connor, Comptroller of the Currency, certified that each of said banks was insolvent and unable to pay its just and legal debts, and thereupon, on October 27, 1934, appointed Harvey S. Adams as receiver for the Reading National Bank,

on November 8, 1934 appointed Edward C. Nolan as receiver for the Farmers National Bank and on November 26, 1934 appointed William H. McGowan as receiver for said Penn National Bank.

24. On January 15, 1935, said defendant J. F. T. O'Connor, Comptroller of the Currency, made an assessment upon the shareholders of said Reading National Bank, wherein he recited that upon a proper accounting by the Receiver to collect the assets of said bank, and upon a valuation of the uncollected assets remaining in his hands it appeared to his [fol. 57] satisfaction that in order to pay the debts of said bank, it was necessary to enforce the individual liability of the stockholders in accordance with the Act of Congress. A true and correct copy of such assessment is hereto annexed, made part hereof, and marked Exhibit "C".

25. Said defendant, J. F. T. O'Connor, Comptroller of the Currency, and said Wellington M. Bertolet, conservator first of said Farmers National Bank and later of said Reading National Bank, and said defendant Harvey S. Adams, receiver of said Reading National Bank, failed, neglected and refused to collect said claim of approximately $9,000,000 of said Reading National Bank against said Farmers National Bank, which was the only and ordinary resource of said Reading National Bank for the payment of its creditors, and on the contrary, without warrant or authority of law, cancelled, abrogated and waived said claim in fraud of the rights of said Reading National Bank, its depositors and other creditors and stockholders thereof, and by reason thereof failed to comply with the conditions and provisions of the National Bank Act upon which stockholders of a national bank may be assessed.

26. The alleged valuation of the remaining assets made by said defendant, J. F. T. O'Connor, Comptroller of the Currency, upon an alleged proper accounting, on which said assessment upon the stockholders of said Reading National Bank was made, excluded as an asset the said claim of Reading National Bank against Farmers National Bank of approximately $9,000,000 and involved a grave error of law based upon his unwarranted assumption of judicial power in abrogating, cancelling and waiving said claim of Reading National Bank against said Farmers National Bank, and

[fol. 58] adjudicating the private rights and obligations of parties not subject to his power and control, whereby the said assessment is invalid and illegal.

27. Plaintiffs are without an adequate remedy by any of the ordinary processes of law, and are prohibited by law from making a defense to such assessment on the grounds here alleged, and can secure redress only by interposition of a Court of equity in this proceeding.

28. Said defendant, Harvey S. Adams, receiver as aforesaid, under instructions from said defendant, J. F. T. O'Connor, Comptroller of the Currency, has notified all stockholders of said Reading National Bank that said assessment is payable on or before February 23, 1935, that those stockholders may have an extension who pay 25% of their said assessment on or before said date, and give their written obligation, satisfactorily guaranteed, to pay 25% on or before March 23, 1935, 25% on or before April 23, 1935, and 25% on or before May 23, 1935, Plaintiffs aver that said defendants unless restrained by this Honorable Court will institute actions against the shareholders who will be unable to make defense thereto on the ground of the invalidity and illegality of said assessments.

Wherefore plaintiffs pray as follows:

1. That said assessment of said defendant, J. F. T. O'Connor, Comptroller of the Currency, under date of January 15, 1935, in the matter of Reading National Bank and Trust Company upon the shareholders thereof for $600,000 be declared invalid, illegal and without warrant or authority of law.

2. That an injunction, preliminary to hearing and final thereafter, issue directed to said defendants, J. F. T. O'Connor, Comptroller of the Currency, and Harvey S. [fol. 59] Adams, Receiver of Reading National Bank and Trust Company restraining them, and each of them, their agents and attorneys from instituting any proceedings at law or otherwise against said stockholders to enforce said assessment.

3. That a temporary restraining order issue until a motion for preliminary injunction may be heard.

4. For such other and further relief as to this Court may seem proper.

Stevens & Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Plaintiffs.

Duly sworn to by J. Edwin Tobias et al. Jurat omitted in printing.

I hereby certify that there has not been sufficient time within which to print the foregoing Bill of Complaint.

Lemuel B. Schofield.

[fol. 60] EXHIBIT "A" TO COMPLAINT

Agreement

This agreement entered into this seventeenth day of February A. D. 1933, by and between Farmers National Bank and Trust Co. of Reading, Pennsylvania, of the First part, Reading National Bank and Trust Company of Reading, of the second part, and Penn National Bank and Trust Co. of Reading, state aforesaid, of the third part.

Witnesseth the parties hereto, in consideration of the mutual covenants, promises and agreements, of each of them to the other, hereby made, and for and in consideration of the sum of One Dollar by each to the other interchangeably paid, receipt whereof is by each of them hereby acknowledged.

Do hereby covenant, promise and agree to and with each other, as follows, to wit:

1. The said parties hereby agree to merge the three Companies under the name of Farmers National Bank & Trust Company of Reading in the manner hereinafter agreed upon.

2. A committee composed of a representative of each of the Companies shall be appointed forthwith by the Presidents of the respective Companies to act with Lybrand, Ross Brothers & Montgomery, Certified Public Accountants, for the purpose of valuing the assets of each of said companies at their fair valuation which shall be submitted to the Board of Directors of each of the Companies for approval.

3. When said valuations have been determined, the said accountants shall submit a plan for an adjustment of the capital structure of the Farmers National Bank and Trust Company of Reading, based on the said valuations and [fol. 61] thereupon such appropriate legal action as shall be necessary to effect a recapitalization of the combined companies shall be taken by each Company, the stockholders of the Reading National Bank and Trust Company shall jointly receive such proportion of the capital stock of the merged corporation as the net valuation of its assets bear to the total net valuation of the assets of the three companies; the stockholders of the Farmers National Bank and Trust Co. of Reading shall jointly receive such proportion of the capital stock of the merged corporation as the net valuation of its assets bear to the total net valuation of the assets of the three companies; and the stockholders of Penn National Bank and Trust Co. of Reading shall jointly receive such proportion of the capital stock of the merged corporation as the net valuation of its assets bear to the total net valuation of the assets of the three companies.

4. This agreement is made subject to the approval of the Comptroller of the Currency, and all other Governmental authorities whose consent will be required to comply with all legal requirements.

5. The Reading National Bank and Trust Company and Penn National Bank and Trust Company of Reading shall forthwith execute all necessary documents to transfer and assign all of their assets to Farmers National Bank and Trust Co. of Reading with the right to hypothecate and rehypothecate any or all of such assets, but conditioned upon the assumption by Farmers National Bank & Trust Co. of Reading of all of the deposit liabilities of the companies as [fol. 62] well as all other liabilities thereof, except liability to stockholders as such, reserving the right to collect from the stockholders of Reading National Bank and Trust Co. and Penn National Bank and Trust Co. of Reading any liabilities which are owing or which may become owing by virtue of the ownership of their stock in the respective banks.

6. A meeting of the Board of Directors of Farmers National Bank and Trust Co. of Reading shall be held Fri-

day, Feb. 17, 1933, at nine o'clock A. M. to elect proper executive officers to conduct the business at the Reading National Bank and Trust Co. branches and at the Penn National Bank and Trust Company of Reading.

7. All legal papers shall be subject to the approval of the Counsel of the Farmers National Bank and Trust Company of Reading.

8. This agreement shall bind the parties thereto, their successors and assigns.

Farmers National Bank & Trust Co. of Reading, by Ferdinand Thun, Chairman of the Board; Chas. T. Cubellis, Asst. to President. Reading National Bank & Trust Company, by H. H. Harrison, President; W. G. Mast, Cashier. Penn National Bank & Trust Co. of Reading, by J. H. Hasbrouck, Presi-
[fol. 63] dent; Jere Hess Barr, Secretary; I. F. Impink, H. F. Kantner, Committee.

EXHIBIT "B" TO COMPLAINT

Supplemental Agreement

This supplemental agreement entered into this 20th day of February, A. D., 1933 by and between Farmers National Bank & Trust Company of Reading, Pa., of the first part, Reading National Bank & Trust Company of Reading, of the second part, and Penn National Bank & Trust Company of Reading, state aforesaid, of the third part;

Whereas, the parties hereto entered into an agreement dated February 17th, 1933, and whereas the parties desire to supplement said agreement,

Now therefore, this agreement witnesseth

First, That the Penn National Bank and Trust Company of Reading and the Reading National Bank & Trust Company of Reading hereby guarantee to the Farmers National Bank & Trust Company of Reading That the assets of their respective banks will in value exceed the deposit liability and other liabilities assumed by the Farmers National Bank & Trust Company of Reading, by virtue of said Agreement of Feb. 17, 1933.

This agreement is executed by the officers of each of said banks, they having been duly authorized by their respective Board of Directors.

[fol. 64] Farmers National Bank & Trust Co. of Reading, —— ——, President; —— ——, Cashier. Reading National Bank & Trust Co. of Reading —— ——, President; —— ——, Cashier. Penn National Bank & Trust Co. of Reading, —— ——, President; —— ——, Cashier.

EXHIBIT "C" TO COMPLAINT

Assessment Upon Shareholders

Treasury Department

Office of the Comptroller of Currency

No. 4887

In the matter of THE READING NATIONAL BANK AND TRUST Co., Reading, Pennsylvania

Washington, D. C., January 15, 1935.

To All Whom It May Concern:

Whereas upon a proper accounting by the Receiver heretofore appointed to collect the assets of The Reading National Bank and Trust Company, of Reading, Pennsylvania, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed in Section 5151, and 5234 of the Revised Statutes of the United States, Section 1 c 156, Act of June 30, 1876, and Section 23, [fol. 65] Act approved December 23, 1913, known as Federal Reserve Act.

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said Reading National Bank and Trust Company, Reading, Penna., for Six Hundred Thousand ($600,000) Dollars to be paid by them on or before the 23d day of February, 1935, and I hereby make

demand upon each and every one of them for the par value of each and every share of capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct H. S. Adams, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof, I have hereto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this 15th day of January, A. D. 1935.

J. F. T. O'Connor, Comptroller of the Currency.
(Seal.)

IN UNITED STATES DISTRICT COURT

8527

SUBPŒNA IN EQUITY—Filed March 5, 1935

The President of the United States of America, to J. F. T. O'Connor, Comptroller of the Currency, and Harvey S. Adams, Receiver of Reading National Bank and Trust Company of Reading, Greeting:

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the [fol. 66] service of this subpœna at the Clerk's office of the United States District Court for the Eastern District of Pennsylvania, at Philadelphia to answer unto the bill of complaint of J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable The United States District Judges at Philadelphia this 23rd day of February A. D. 1935.

George Brodbeck, Clerk, by E. G. Johnson, Deputy Clerk.

Memorandum

The Defendants in this case are required to file an answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

Return on Service of Writ

UNITED STATES OF AMERICA,
District of Columbia, ss:

I hereby certify and return, that on the 27th day of February, 1935, I received the within subpœna and served copy of the same, together with the bill of complaint in said case, on J. F. T. O'Connor, Comptroller of the Currency by personal service of the same on Gibbs Lyon, Deputy Comptroller of the Currency, February 27, 1935.

John B. Colpoy, United States Marshal, by Harry Callen, Deputy United States Marshal.

[fol. 67] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed March 8, 1935

Comes now the defendant Harvey S. Adams, as Receiver of Reading National Bank and Trust Company, and respectfully moves this Honorable Court to dismiss the bill of complaint filed herein, upon the following grounds:

1. The said bill of complaint does not state facts sufficient to entitle plaintiff to any relief, there being no equity stated in the bill.

2. The said bill of complaint shows on its face that the levying of the assessment by the Comptroller of the Currency on the stockholders of the Reading National Bank and Trust Company as to which relief is sought, was done in pursuance of the administrative jurisdiction, discretion and judgment of the Comptroller of the Currency, and that the Comptroller of the Currency, in so acting, exercised the official discretion vested in him by law in the premises, and that this Court should not disturb such discretionary acts.

3. The said bill of complaint seeks to attack the validity and effect of acts performed by administrative and executive officers of the Federal Government within the course of their official discretion and duty.

4. Upon the facts covered in said bill of complaint this Court, in exercising its discretion as to the injunctive relief sought, should deny such relief and dismiss the bill.

5. The bill of complaint states no cause of action against this defendant, nor are the averments thereof sufficient to entitle plaintiffs to the relief sought.

[fol. 68] 6. The bill of complaint is multifarious.

7. The averments of said bill, upon which the right to the relief sought is based, are merely statements of conclusion of law and of fact.

8. The said bill shows on its face that it constitutes a collateral attack on the validity of the stock assessment levied by the Comptroller of the Currency in the course of his administrative discretion and authority.

9. The bill of complaint shows on its face that the stock assessment is valid and that the validity of such assessment can not be contested in this action.

10. The averments of said bill are to the effect that if certain alleged causes of action are pursued, or if certain alleged agreements are performed there will be no occasion or necessity for an assessment and that there will be sufficient to pay the creditors in full, all of which constitutes conclusions of law and of fact, and further constitutes an attempt to attack collaterally the finding by the Comptroller of insolvency of the bank and of the necessity for an assessment, the determination of all of which matters is vested by law exclusively in the Comptroller, whose determination of such matters is not open to attack or to review by this Court under the facts averred in said bill of complaint.

11. The said bill of complaint shows upon its face that the acts and matters complained of, as to which relief is sought, were embraced within the exclusive official and administrative jurisdiction, discretion and control of the Comptroller of the Currency, and that the Comptroller in so acting exercised the official and administrative discretion vested in him by law in the premises, and that this [fol. 69] Honorable Court is precluded from reviewing or disturbing the findings, conclusions and acts of the Comptroller of the Currency in such matters.

12. That said bill shows on its face that the plaintiffs have been guilty of laches.

13. That if such alleged merger had been effected the stockholders of the Reading National Bank and Trust Company would not have been legally entitled to notice, as is suggested in said bill of complaint (paragraph 19).

14. The bill of complaint shows on its face that this was not a legal consolidation under the Act of November 7, 1918, as amended, requiring the Comptroller's certificate of approval, nor does said bill show that the Comptroller was a party to said alleged merger, or that he authorized or consented to it, or that he ratified it, or that he officially or otherwise approved it.

15. And for other and further reasons apparent in said bill of complaint.

Harry R. Matten, Charles W. Matten, Charles E. Wainwright, Attorneys for Defendant, Harvey S. Adams, Receiver, Reading National Bank & Trust Co.

STATE OF PENNSYLVANIA,
County of Berks, ss:

Harvey S. Adams being duly sworn according to law, deposes and says that he is one of the defendants in the above case and that the foregoing Motion to Dismiss Bill of Complaint is not made for delay but because he verily [fol. 70] believes complainants have no legal cause of action.

Harvey S. Adams.

Sworn and subscribed to before me this Seventh day of March A. D. 1935. Kathryn G. Sauer, Notary Public. My commission expires March 5, 1937. (Seal.)

IN UNITED STATES DISTRICT COURT

MOTION TO QUASH PROCESS—Filed March 8, 1935

Comes now J. F. T. O'Connor, as Comptroller of the Currency, defendant in the above entitled cause, by his attorneys, appearing solely for the purpose of challenging the jurisdiction of the Court over said defendant and for

no other purpose, and respectfully moves this Honorable Court to quash the subpœna and process issued in this cause on February 23, 1935, pursuant to which said defendant was served by the United States Marshal in and for the District of Columbia on February 27, 1935, and to dismiss said bill of complaint as to this defendant, upon the following grounds:

1. Service of process was not had on said defendant in the Eastern District of Pennsylvania.

2. Service of process on said defendant was not made by the United States Marshal for and in the Eastern District of Pennsylvania.

3. The said defendant is not an inhabitant or resident of the Eastern District of Pennsylvania within the purview of Title 28, Section 112 United States Code Annotated, which requires all civil suits to be brought in the district court of the district whereof the defendant is an inhabitant.

[fol. 71] 4. And for other reasons apparent of record.

Charles E. Wainwright, Harry R. Matten, Charles W. Matten, Attorneys for Defendant, J. F. T. O'Connor, Comptroller of the Currency.

In United States District Court

Appearance—Filed March 8, 1935

To the District Court of the United States for the Eastern District of Pennsylvania:

The Clerk of this Court will please enter our appearance de bene esse as attorneys for J. F. T. O'Connor, Comptroller of the Currency of the United States.

(Sgd.) Chas. W. Matten, Harry R. Matten, Attorneys for J. F. T. O'Connor, Comptroller of the Currency.

Dated: March 8, 1935.
To George Brodbeck, Clerk.

In United States District Court

Opinion sur Motion to Dismiss Bill of Complaint—Filed May 6, 1935

For the reasons stated in the opinion filed herewith in Nagle, et al. vs. O'Connor, Equity, No. 8525, this bill may be dismissed.

W. H. Kirkpatrick, J.

[fol. 72] In United States District Court

Motion for Leave to File Amendment to Bill of Complaint—Filed May 29, 1935

And now, to wit, this 29th day of May A. D., 1935, come the plaintiffs, by their attorneys, and move the Court for leave to amend their Bill of Complaint, as follows:

1. By adding a new paragraph after Paragraph 14, and before Paragraph 15 of the Bill, to be designated as Paragraph 14 a, to read as follows:

14 (a) At the time of the execution of said agreement of February 17, 1933, the assets of said Farmers' National Bank were of a nature similar in character to those of said Reading National Bank, and had a book value of approximately $9,500,000, which after a deduction for depreciation of approximately $1,500,000, represented a fair and reasonable net market value of approximately $8,000,000, as against liabilities to creditors of approximately $9,000,000, and a liability to stockholders on its capital stock of $1,000,000; that the general claim of said Reading National Bank under said Agreement of February 17, 1935, included not only the obligation of said Farmers National Bank to said Reading National Bank and to the depositors and other creditors of said Reading National Bank, and also the liability of the stockholders of said Farmers National Bank to assessment on the capital stock of $1,000,000, but in addition the assets of said Reading National Bank transferred and delivered to Farmers National Bank as aforesaid, and the commingled assets of said Reading National Bank and Farmers National Bank, were subject to an equitable lien and charge in favor of said Reading National Bank and its

[fol. 73] creditors, and constituted a trust fund for their benefit, and the said general claim of the said Reading National Bank against the Farmers National Bank as thus constituted was then and now is more than sufficient in the ordinary course of liquidation to pay and discharge all liabilities of said Reading National Bank without the necessity of any assessment upon the stockholders of the Reading National Bank.

2. By striking out the following words in Paragraph 19 of the Bill: "and a division of the proceeds on the basis of 35% to Farmers National Bank, 25% to Penn National Bank, and 25% to Reading National Bank," and in lieu thereof to insert "in consideration for which the new National Bank was to establish on its books lump sum credits for the benefit of the Conservator of each of said banks in an amount sufficient to permit a distribution to be made to the depositors and other creditors of each of said banks in the following percentages of the claims against each of said banks, 35% to Farmers National Bank, 25% to Penn National Bank and 25% to Reading National Bank."

(Sgd.) George C. Eaves, Stevens and Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Plaintiffs.

And now, to wit, this — day of —— A. D. 1935, in consideration of the foregoing Motion, the Court grants leave to the plaintiffs to amend their Bill as therein stated.

——

—— ——, J.

[fol. 74] IN UNITED STATES DISTRICT COURT

STIPULATION RE MOTION TO DISMISS—Filed September 9, 1935

It is hereby stipulated by and between the above-entitled parties, by their respective attorneys, that the motion to dismiss the original bill of complaint heretofore filed in the above entitled cause shall stand and be adopted and considered in all respects as a motion to dismiss the amended bill of complaint herein.

(Sgd.) George Eaves, Attorney for Plaintiffs.
(Sgd.) Charles E. Wainwright, Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

OPINION SUR MOTION TO AMEND BILL OF COMPLAINT, MOTION TO QUASH PROCESS AND REARGUMENT SUR MOTION FOR PRELIMINARY INJUNCTION

Before KIRKPATRICK, J.

The same order will be made in this case as in Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Moyer vs. J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, No. 8525, December Term, 1934, for the reasons stated in a memorandum opinion filed in that case.

[fol. 75] IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING MOTION TO DISMISS AND DENYING MOTION FOR PRELIMINARY INJUNCTION—Filed June 25, 1935

This cause coming on to — heard on April 15, A. D. 1935, on motion of defendant J. F. T. O'Connor, as Comptroller of the Currency, to quash service of subpœna and process, and upon motion of the defendant Harvey S. Adams, as Receiver of the Reading National Bank and Trust Company of Reading, to dismiss Plaintiffs' Bill of Complaint, and upon motion of plaintiffs for preliminary injunction, and further coming on to be heard on May 29, 1935, and on June 17, 1935, on motion for leave to amend the original bill of complaint herein, and said motions having been argued respectively by counsel in open court, and upon consideration thereof, it is by the Court this 25th day of June, A. D. 1935,

Ordered, adjudged, and decreed, that said motion for leave to amend the original bill of complaint herein, be and the same hereby is granted and that said motion to quash service of subpœna and process on defendant J. F. T. O'Connor, Comptroller of the Currency be and the same hereby is sustained, and that said motion to dismiss plaintiffs' amended bill of complaint filed herein be dismissed as to both defendants, and that defendants recover their proper costs and that plaintiffs be adjudged to pay all

proper costs incurred by said defendants in this cause, for which let execution issue; and it is further,

Ordered, adjudged and decreed, that plaintiffs' motion herein for a preliminary injunction be and the same hereby is denied.

(Sgd.) W. H. Kirkpatrick, United States District Judge.

[fol. 76] In United States District Court

Order Directing That Opinion of Court Stand as Its Finding of Fact and Conclusion of Law—Filed July 22, 1935

And now, to wit July 20, 1935, on motion of the above-named plaintiffs, it is Ordered that the opinions of this Court rendered in the above-entitled suit on the motion to dismiss the bill of complaint herein, and the motion to quash the subpœna and set aside the service thereof, may stand as the findings of fact and conclusions of law in accordance with the provisions of Equity Rule 70½.

W. H. Kirkpatrick, J.

In United States District Court

Order Allowing Amendments to Bill of Complaint Nunc Pro Tunc as of June 25, 1935—Filed August 5, 1935

And now, to wit, July 31, 1935, on consideration of the motion of plaintiffs for leave to file amendments to the bill of complaint herein as therein stated, said motion is granted, and said proposed amendments shall stand as amendments to said bill of complaint nunc pro tunc as of June 25, 1935.

W. H. Kirkpatrick, United States District Judge.

In United States District Court

Assignments of Error—Filed August 5, 1935

Now come the plaintiffs in the above entitled cause and file the following assignments of error upon which they rely [fol. 77] in the prosecution of their appeal in the above

entitled cause from the Order and Decree made and entered by this Honorable Court on the 25th day of June, 1935.

1. The Court erred in sustaining the motion to dismiss the Bill of Complaint herein by deciding that the facts alleged do not entitle plaintiffs to relief.

2. The Court erred in sustaining the motion to quash service of process on the Comptroller of the Currency by deciding that the suit was brought by individuals and not by a national bank.

3. The Court erred in its conclusion as follows: (Supp. Op. par. 3)

"The whole basis of the bill is that the Comptroller's determination of the necessity for an assessment was incorrect."

4. The Court erred in not holding that the determination by the Comptroller as to the propriety and amount of an assessment on stockholders is subject to a direct attack by a suit in equity where such determination is beyond the authority of the Comptroller, violates the requirements of due process, or is arbitrary and capricious.

5. The Court erred in not holding that the determination by the Comptroller as to the propriety and amount of an assessment, is subject to the condition precedent that the ordinary resources of the bank be first exhausted, and a deficit thereby established.

6. The Court erred in not finding that the only and ordinary resources of the bank consisted of its rights under a valid contract with the Farmers' Bank covering the transfer of all assets to, and the assumption of all liabilities by, the Farmers' Bank, that said resources were more than sufficient in the ordinary course of liquidation to pay and discharge all liabilities without the necessity of an assessment, that such resources had not been exhausted, and that no deficit in fact existed.

[fol. 78]

7. The Court, in failing to assume as true the facts properly alleged in the Bill of Complaint and amendments thereto, erred in its conclusion as follows: (Supp. Op. par. 3)

"The amendments however merely emphasize the thought expressed in the fourth paragraph of the opinion—namely,

that relief asked for necessarily depends upon an immensely complicated accounting by the Court in this proceeding to determine the question whether the Reading Bank was or was not really solvent at the time of the Comptroller's determination—a proceeding which obviously involves countless questions not only of fact but of law. For example the assets transferred to the Farmers National Bank would have to be valued; the assets and liabilities of the Farmers Bank itself would have to be considered in order to determine how much its alleged agreement to assume the deposit liabilities of the Reading Bank was worth; the agreement itself would have to be construed and the legal question whether or not it created an equitable lien in favor of the Reading Bank in the transferred assets would have to be determined."

8. The Court erred in not finding that the Comptroller without right or authority prior to the assessment made a ruling abrogating the valid contract between the bank and the Farmers' Bank and all rights thereunder, under which ruling the said contract and all rights thereunder were abandoned as assets of the bank without any attempt to [fol. 79] enforce, collect or value the same, and were ignored and disregarded in the making of the assessment by the Comptroller.

9. The Court erred in not holding that the assessment by the Comptroller was beyond his authority, violated the requirements of due process and was arbitrary and capricious.

10. The Court erred in its conclusion that the Bill of Complaint alleged fraud in general terms.

11. The Court erred in its conclusion as follows (Supp. Op., par. 3)

"Admittedly, if the bank was insolvent the Comptroller's determination was a correct one, no matter by what process he arrived at it."

12. The Court erred in its conclusion as follows: (Supp. Op. par. 3)

"The financial condition of the bank can never be estimated accurately except by the process above referred to and it is not the stockholders' right to demand this proceed-

ing until the time for it arrives in the final winding up of the bank's affairs."

Wherefore the appellants pray that said decree be reversed and for such other and further relief as may be proper.

George Eves, John B. Stevens, Harry W. Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Appellants, by Lemuel B. Schofield.

August 5, 1935.

[fol. 80] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL

To the Honorable Judges of the Said Court:

The above-named plaintiffs feeling aggrieved by the decree rendered and entered in the above entitled cause on the 25th day of June, 1935 do hereby appeal from said decree to the Circuit Court of Appeals for the Third Circuit for the reasons set forth in the assignments of error filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit, under the rules of said court in such cases made and provided.

And your petitioners further pray that the proper order relating to the security to be required of them be made.

George Eves, Stevens and Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Petitioners, by (Sgd.) Lemuel B. Schofield.

August —, 1935.

ORDER ALLOWING APPEAL

Appeal allowed upon giving bond in the sum of $250., to be approved by the Clerk of the District Court, conditioned for the payment of costs on appeal.

August 9, 1935.

O. B. Dickinson, J.

[fol. 81] IN UNITED STATES DISTRICT COURT

CITATION—Filed August 9, 1935

UNITED STATES OF AMERICA, ss:

The President of the United States to J. F. T. O'Connor, Comptroller of the Currency, and Harvey S. Adams, Receiver of Reading National Bank and Trust Company of Reading, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States, Eastern District of Pennsylvania, wherein J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith, are appellants and you are appellees to show cause, if any there be, why the Decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable O. B. Dickinson, Judge of the District Court of the United States, this 9th day of August, in the year of our Lord one thousand and nine hundred and thirty-five.

(Sgd.) O. B. Dickinson, District Judge.

STIPULATION

It is hereby stipulated by and between Stevens & Lee, Edw. D. Trexler, W. Bradley Ward, George Eaves and Lemuel B. Schofield, Attorneys for the appellants in the above entitled cause, and Charles E. Wainwright, attorney for appellee, that service of citation on appeal dated August [fol. 82] 9, 1935, is accepted as to the appellee J. F. T. O'Connor, Comptroller of the Currency of the United States, for the sole and only purpose of permitting a review on appeal of the action of the Trial Court in sustaining a motion of appellee O'Connor to quash service of subpoena and process.

It is further stipulated by and between Counsel for appellants and appellee that the service of said citation on appellee, so far as the appellee O'Connor is concerned, is

not to be construed as permitting a review of the case on the merits, and the acceptance of such service is to be limited to the purposes above stated, and no other.

(Sgd.) Stevens & Lee, Edward D. Trexler, George Eaves, W. Bradley Ward, Lemuel B. Schofield, Charles E. Wainwright, Attorney- for Appellee.

In United States District Court

Stipulation and Order of Consolidation—Filed August 9, 1935

It is hereby stipulated and agreed by and between the attorneys for the respective parties that the appeals in the above entitled suits be and the same are hereby consolidated, and that a joint record shall be printed, and that an order may be entered to that effect without any further notice.

George Eves, John B. Stevens, Harry W. Lee, Ed-
[fol. 83] ward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Appellants, by (Sgd.) Lemuel B. Schofield. Chas. W. Matten, Chas. Wainwright, Attorneys for Appellees.

August 9th, 1935.

Order

Before Dickinson, J.

It is ordered by this Court that Cause No. 8525 In Equity, entitled Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Moyer, Plaintiffs vs. J. F. T. O'Connor, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, Defendants, and Cause No. 8527 In Equity, entitled J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith, Plaintiffs vs. J. F. T. O'Connor, Comptroller of The Currency and Harvey S. Adams, Receiver of Reading National Bank and Trust Company of Reading, Defendants, be and the same are hereby consolidated for the purpose of appeal, and that a joint record may be printed.

By the Court.

Attest:

Aug. 9, 1935. Leo A. Lilly, Deputy Clerk.

[fol. 84] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR RECORD—Filed September 9, 1935

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Third Circuit, pursuant to an appeal allowed in the above entitled proceedings, and to include in such transcript the following:

1. Bill of Complaint.
2. Duplicate Original Subpoena.
3. Return of Service of Duplicate Original Subpoena.
4. Motion to Dismiss Bill of Complaint.
5. Motion by J. F. T. O'Connor, Comptroller, to Quash Subpoena.
6. Appearance de bene esse of Charles W. Matten and Harry R. Matten for J. F. T. O'Connor, Comptroller.
7. Opinion, Kirkpatrick, Jr., dismissing Bill of Complaint.
8. Motion for leave to file Amendment to Bill of Complaint.
9. Stipulation of counsel regarding motion to dismiss amended bill of complaint.
10. Opinion, Kirkpatrick, J., granting leave to amend Bill and granting Motion to Quash Process.
11. Decree of June 25, 1935 granting leave to amend Bill, granting Motion to Quash Service of Process, denying Motion for Preliminary Injunction and dismissing Bill of Complaint with costs.
12. Order of Court directing that Opinions of Court stand as its findings of fact and conclusions of law.
13. Order of Court allowing Amendments to Bill of Complaint nunc pro tunc.

[fol. 85-86] 14. Assignments of Error.

15. Petition for Appeal and Order allowing same.
16. Citation on Appeal and acknowledgment of Service.
17. Stipulation of counsel regarding appellee J. F. T. O'Connor, Comptroller of the Currency.
18. Docket Entries.
19. Praecipe for Transcript.
20. Certificate of Clerk.

and file said transcript with the Clerk of the United States Circuit Court of Appeals for the Third Circuit.

(Sgd.) George Eves, John B. Stevens, Harry W. Lee, Edward D. Trexler, W. Bradley Ward, Lemuel B. Schofield, Attorneys for Appellants.

Aug. 26, 1935.

We hereby acknowledge receipt of a copy of the Praecipe for Record of which this is the original.

(Sgd.) Chas. W. Matten, Charles E. Wainwright, Attorneys for Appellees.

August 27, 1935.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 87] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1936

No. 5949

GENEVA M. NAGLE et al., Appellants,

vs.

J. F. T. O'CONNOR, Comptroller of the Currency, et al., Appellees

No. 5950. March Term, 1936

J. EDWIN TOBIAS et al., Appellants,

vs.

J. F. T. O'CONNOR, Comptroller of the Currency, et al., Appellees

And afterwards, to wit, the 12th day of March, 1936, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 10th day of March, 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 88] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1936

No. 5949

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY and WILLIAM M. MAYER, Plaintiff-Appellants,

v.

J. F. T. O'CONNOR, Comptroller of the Currency, and WILLIAM H. McGOWAN, Receiver of Penn National Bank and Trust Co. of Reading, Defendants-Appellees

No. 5950. March Term, 1936

J. EDWIN TOBIAS, RALPH S. HILL and OSCAR P. SMITH, Plaintiff-Appellants,

v.

J. F. T. O'CONNOR, Comptroller of the Currency, and Harvey S. Adams, Receiver of Reading National Bank & Trust Company of Reading, Defendants-Appellees

OPINION—Filed March 10, 1937

Appeals from the United States District Court for the Eastern District of Pennsylvania

Before Buffington, Davis and Thompson, Circuit Judges

[fol. 89] DAVIS, Circuit Judge:

These cases involve the validity of a levy by the Comptroller of an assessment of 100 per cent. on the stockholders of two national banks, the Penn National Bank and the Reading National Bank of Reading, Pennsylvania, hereinafter called the Penn Bank and the Reading Bank. They involve the same question of law and were tried together in the District Court and argued together here.

The real question is whether or not in making the assessment the Comptroller transcended the power and authority conferred upon him by Congress.

On February 17, 1933, the Penn Bank and the Reading Bank entered into an agreement with the Farmers National

Bank and Trust Company of Reading, Pennsylvania, hereinafter called the Farmers Bank, wherein the Penn Bank and the Reading Bank agreed to consolidate with and under the name of the Farmers Bank. The Penn and Reading Banks were forthwith to transfer all of their assets to the Farmers Bank upon the condition that it would assume all liabilities of every kind of the Penn and Reading Banks except liabilities of stockholders as such. The Penn and Reading Banks immediately ceased doing a banking business and transferred all of their assets, which are alleged to have been more than enough to pay their liabilities, to the Farmers Bank which, however, did not pay, as it had agreed to do, the liabilities of the other two banks, but went on conducting a banking business with the combined assets of the three banks until March 18th, 1933 when William M. Bertolet was appointed conservator for it. He took possession of the assets of the Farmers Bank which included those coming from the Penn Bank and the Reading Bank, and carried on the banking business of the Farmers Bank, commingling all the assets of the three banks and using them indiscriminately to discharge the obligations of the Farm-[fol. 90] ers Bank, until October 10, 1933, when the Comptroller "abrogated" and set aside the contract between the banks of February 17, 1933, and attempted to allocate among the three banks the assets then belonging to the Farmers Bank. He certified on that day that the Penn Bank and the Reading Bank were unable to transact and carry on business and appointed Bertolet conservator for each of them.

He continued as conservator for each of the three banks until October 27, 1934 when the Comptroller certified that each of the three banks was insolvent and unable to pay its just and legal debts and appointed receivers for each of them.

On January 15, 1935 he levied an assessment of 100 per cent. of their individual liability upon the stockholders as follows:

"To All Whom It May Concern: Whereas, upon a proper accounting by the Receiver heretofore appointed to collect the assets of The Penn National Bank and Trust Company, of Reading, Pennsylvania, and upon a valuation of the uncollected assets remaining in his hands, it appears to my

satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed in Section 5151 and 5234 of the Revised Statutes of the United States, Section 1 c 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as Federal Reserve Act.

Now, therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said Penn National Bank and Trust Company, of Reading, Pennsylvania, for One Million ($1,000,000.) Dollars, to be paid by them on or before the 23rd day of February, 1935, and I hereby make demand upon each and every one of them for the par value of each [fol. 91] and every share of capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Wm. H. McGowan, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders."

The crux of this case centers in the right of the Comptroller to abrogate and set aside the contract in accordance with which the Penn and Reading Banks conveyed their assets to the Farmers Bank, in consideration for which the Farmers Bank agreed to pay the obligations of the other two banks. There is no allegation anywhere that the banks were then, February 17, 1933, insolvent though they may have been in imminent danger. It is nowhere alleged that the directors of the banks in entering into that agreement were not acting in good faith and for the best interest of all of the banks. There is no hint that the agreement was in any way fraudulent.

Under these circumstances, it was beyond the power of the Comptroller, eight months afterward by mere ipse dixit, to set aside the contracts between the banks and proceed as though they had never been made. Wannamaker v. Edisto National Bank of Orangeburg, 62 Fed. (2nd) 696. Congress did not give him such power. No principle of law, which, in our opinion, authorizes the Comptroller to do this has been cited by counsel or the court below.

The authority to levy an assessment upon the stockholders is contained in section 192 of the National Bank Act, which provides that:

"* * * Such receiver, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it and, upon the order of a Court of Record of competent jurisdiction, may sell [fol. 92] or compound all bad or doubtful debts, and on a like order, may sell all the real and personal property of such association, on such terms as the Court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings. * * *"

The Comptroller has power to decide when and to the extent it is necessary to enforce the liability of stockholders. These are matters within his administrative discretion and his determination of these questions is ordinarily conclusive and may not be judicially reviewed. Kennedy v. Gibson, et al., 75 U. S. 498, 505. But in reaching his conclusion as to this necessity, he may not act arbitrarily, capriciously and in entire disregard of the provisions of the statute. Stockholders are only conditionally liable for the debts of the bank "after all the ordinary resources of the bank have been exhausted". Bank v. Kennedy, 84 U. S. 19; In United States v. Knox, 102 U. S. 422, the court said:

"In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain, 1, the whole amount of the par value of all the stock held by all the stockholders; 2, the amount of the deficit to be paid after exhausting all the assets of the bank; 3, then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value."

It is the policy of the government to wind up the affairs of insolvent banks speedily and justly and notwithstanding the language in the above case and similar language in other [fol. 93] cases, the Comptroller is not obliged to wait until all the assets of an insolvent bank are literally "exhausted"

before he determines the necessity of enforcing individual liability of the stockholders. Miller v. Stock, et al., 65 Fed. (2d) 773; Kennedy v. Gibson, 75 U. S. 498; Studebaker v. Perry, 184 U. S. 258; Korbly v. Springfield Institution for Savings, 245 U. S. 330, 333. If he were compelled thus to wait, it would delay the winding up of banks too long and this might cause great loss to creditors of the banks because many stockholders might in the meantime become insolvent or remove their property beyond the reach of the Comptroller.

But no case has gone so far as to hold that the Comptroller may entirely disregard the statutory provisions for winding up an insolvent bank and arbitrarily, and in violation of law, enforce the individual liability of stockholders. But this is exactly what the Comptroller did in this case. He abrogated and set aside valid contracts between the banks and did not take into account, when he made the levy, the contract obligation of the Farmers Bank to pay "all the deposit liabilities, except liability to stockholders as such", but with administrative fiat, without notice to the banks, without a hearing and without due process of law, he stripped the banks of their only assets, which, it is alleged and not denied, were sufficient to pay all the debts of the banks without the necessity of making an assessment, and thereupon substituted the portion of the assets of the Farmers Bank, to which he thought under changed conditions and materially different circumstances the other two banks would be entitled at that time. He thus without authority and contrary to law tried to create a new situation upon which he determined the necessity of enforcing individual liability of stockholders.

There were no answers filed to the bills in these cases. The motions to dismiss them have the effect of a demurrer [fol. 94] and all the facts properly alleged are admitted. While some of the allegations may be conclusions of law or inferences of fact, the following may be taken as admitted:

1. The only assets of the two banks are their claims against the Farmers Bank.

2. These claims are sufficient to pay the debts of the two banks without the necessity of an assessment.

3. The Comptroller refused to resort to these claims and use them to pay the debts of the two banks.

The bill alleges in the case of the Penn Bank that the assets transferred to the Farmers Bank had at that time a fair value of over $6,500,000 and after depreciation had a fair and reasonable net market value of more than $350,000 over its liabilities. It is alleged in the bill that the assets transferred to the Farmers Bank by the Reading Bank on February 17, 1933 in accordance with the agreement had "a fair and reasonable value in excess of the deposit liabilities of said Reading National Bank". The motions admit the truth of these allegations.

It is well settled that an assessment upon stockholders to enforce individual liability may not be attacked collaterally. Kennedy v. Gibson, 75 U. S. 498; Casey v. Galli, 94 U. S. 673. But when the head of a department exceeds his authority, abrogates valid contracts and proceeds as though such contracts had never been made, he may be restrained by injunction which is a direct attack upon his acts and is the recognized mode of procedure by which the wrongful action of the executive head of a department may be restrained. "Where the terms and meaning of an act of Congress are plain, and a court is convinced upon reason and authority [fol. 95] that a correct determination of the question before it requires a decision contrary to the construction and practice of the officers of an executive department of the government, that determination must prevail, and that decision must be rendered. The courts cannot lawfully renounce their judicial powers in favor of opinions of officers of other departments." Where the administrative order of an executive head is based upon a clear error of law, fraud or mistake, it may be avoided by a direct attack. Deweese v. Smith et al. 106 Fed. 438, 445; United States v. Knox, 102 U. S. 422; Swift Company v. United States, 105 U. S. 691; Merritt v. Cameron, 137 U. S. 542; Noble v. Union River Logging Railroad Co., 147 U. S. 165, 172; United States v. Tanner, 147 U. S. 661, 663; Webster v. Luther, 163 U. S. 331, 342; School of Magnetic Healing v. McAnnulty, 187 U. S. 94.

The Comptroller exceeded his power and authority when he abrogated and set aside the contracts between the Farmers Bank on the one side and the Penn Bank and the Reading Bank on the other.

His motions to dismiss the bills admit the allegations that the claims of the Penn and Reading Banks against the Farm-

ers Bank are more than sufficient to pay their indebtedness without the necessity of making an assessment.

Under these circumstances the Comptroller has no authority to levy an assessment against the appellants. They are invalid and the orders dismissing the bills of complaint and denying preliminary injunctions are reversed.

BUFFINGTON, J., dissenting:

These cases involve the levying by the Comptroller of a 100% assessment on the shareholders of two national banks in the hands of receivers. In each case the court below dis- [fol. 96] missed a bill in equity brought by a stockholder praying an injunction restraining the receiver from collecting such assessment.

The facts of the case are that the Penn National Bank & Trust Company of Reading, hereafter called Penn, and the Reading National Bank & Trust Company, hereafter called Reading, were national banks. On February 17, 1933, these two banks entered into a written agreement with the Farmers National Bank and Trust Company, also a national bank, and hereafter called Farmers, for a consolidation of Penn and Reading with Farmers, the latter agreeing to pay all obligations of Penn and Reading. This agreement was followed by a transfer by Penn and Reading of all their assets to Farmers and the latter assumed control of them. Thereafter Penn and Reading ceased doing business. On March 18, 1933, the Comptroller appointed a conservator for Farmers, who administered the assets of all three banks until October 10, 1933, when the Comptroller directed that the agreements of consolidation should be disregarded and then appointed conservators for Penn and Reading. The bill alleges he had no power at law to so order and that he has disregarded and failed to enforce the claim of Penn and Reading against Farmers—for which latter a receiver was appointed—as have also the receivers of Penn and Reading. The receivers of Penn and Reading have proceeded to collect and administer the returned assets and on January 15, 1935, the Comptroller made the assessment complained of, in which he recited (italics mine):

"Whereas, upon a proper *accounting by the Receiver* heretofore appointed to collect the assets of The Penn National Bank and Trust Company, of Reading, Pennsyl-

vania, and upon a *valuation of the uncollected assets* remaining in his hands, it appears to my satisfaction that in order [fol. 97] to pay the debts of such association it is necessary to enforce the individual liability of the stockholders therefor to the extent hereinafter mentioned, as prescribed in Section 5151 and 5234 of the Revised Statutes of the United States, Section I c 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as Federal Reserve Act,"

It therefore appears the receivers have collected the assets of said banks and on the basis of what has been collected and the valuation of those not collected (which would include the alleged claims of Penn and Reading against Farmers) it was necessary to assess the shareholders 100%. In that regard the court below stated:

"Granted that the Comptroller should have taken the situation as it existed when the Bank closed instead of proceeding to undo and unscramble the assets, there is absolutely nothing to show that, as a matter of assets and liabilities, these stockholders have suffered by the method adopted by the Comptroller. Whether the agreement of the Farmers Bank to pay deposit liabilities was worth more or less than the assets which were allocated in its place is not shown. Inferentially, it would not appear to have been worth its face value since the Farmers Bank was also in receivership and is now in process of reorganization,"

and accordingly held:

"It is perfectly clear from the later decisions that it was never meant that the stockholders could institute an inquiry into the correctness of the Comptroller's determination, and proceed to fix the amount of their liability as on an accounting, by a proceeding in equity, pending which, suits are to be stayed. Such interpretation would utterly defeat the [fol. 98] whole purpose of the policy involved which is to 'expeditiously and justly wind up the affairs and the paying of debts of National Banks'."

Its so holding was in line with decision of this court in Miller v. Stock, 65 Fed. (2d) 773, and the Supreme Court cases there cited. Regarding the dismissal of the bill was

rightly ordered by the court below, I am constrained to dissent.

A true Copy. Teste:
——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 99] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1936

No. 5949

GENEVA M. NAGLE et al., Appellants,

vs.

J. F. T. O'CONNOR, Comptroller of the Currency, and William H. McGowan, Receiver of Penn National Bank and Trust Company of Reading, Appellees.

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order of June 25, 1935 of the said District Court in this cause be, and the same is hereby reversed, with costs.

Philadelphia, March 10, 1937.
J. Warren Davis, Circuit Judge.

Endorsements: Order Reversing Order of June 25, 1935. Received & Filed Mar. 10, 1937. Wm. P. Rowland, Clerk.

[fol. 100] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1936

No. 5950

J. EDWIN TOBIAS et al., Appellants,

vs.

J. F. T. O'CONNOR, Comptroller of the Treasury, and Harvey S. Adams, Receiver of Reading National Bank & Trust Co., Appellees

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order of June 25, 1935 of the said District Court in this cause be, and the same is hereby reversed, with costs.

Philadelphia, March 10, 1937.

J. Warren Davis, Circuit Judge.

Endorsements: Order Reversing Order of June 25, 1935. Received & Filed Mar. 10, 1937. Wm. P. Rowland, Clerk.

[fol. 114] In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1936

No. 5949

Geneva M. Nagle et al., Appellants,

vs.

J. F. T. O'Connor, Comptroller of the Currency, et al., Appellees

Sur Petition for Rehearing

And Now, to wit, April 19, 1937, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

Per Curiam Buffington, Circuit Judge.

Endorsements: Order Denying Petition for Rehearing. Received & Filed Apr. 19, 1937. Wm. P. Rowland, Clerk.

[fol. 115] In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1936

No. 5950.

J. Edwin Tobias et al., Appellants,

vs.

J. F. T. O'Connor, Comptroller of the Currency, et al., Appellees

Sur Petition for Rehearing

And Now, to wit, April 19, 1937, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

Per Curiam Buffington, Circuit Judge.

Endorsements: Order Denying Petition for Rehearing. Received & Filed Apr. 19, 1937. Wm. P. Rowland, Clerk.

[fol. 116] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the cases of Geneva M. Nagle et al., Appellants, vs. J. F. T. O'Connor, Comptroller of the Currency, et al., Appellees, No. 5949; J. Edwin Tobias et al., Appellants, vs. J. F. T. O'Connor, Comptroller of the Currency, et al., Appellees, No. 5950, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 21st day of April, in the year of our Lord one thousand nine hundred and thirty-seven and of the Independence of the United States the one hundred and sixty-first.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 117] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 123

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

[fol. 118] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 124

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: Enter Brice Clagett. File Nos. 41,604, 41,606. U. S. Circuit Court of Appeals, Third Circuit. Term No. 123. Harvey S. Adams, Receiver, Penn National Bank and Trust Company of Reading, Pennsylvania, petitioner, vs. Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Mayer. Term No. 124. Harvey S. Adams, Receiver, Reading National Bank and Trust Company of Reading, Pennsylvania, petitioner, vs. J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith. Petition for writs of certiorari and exhibit thereto. Filed June 8, 1937. Term Nos. 123, O. T., 1937, 124, O. T., 1937.

FILE COPY

Supreme Court, U.S.
FILED
JUN 8 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 123

Harvey G. Ahlers, Director, Texas Liquor Control Board, and Texas Company of Dallas, Petitioners,

vs.

Cactus Pete's, Inc., et al., Respondents.

No. 124

Harvey G. Ahlers, Director, Texas Liquor Control Board, et al., Petitioners,

vs.

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IN THE

Supreme Court of the United States

October Term 1937

No. ———

Harvey S. Adams, Receiver, Penn National Bank and Trust Company of Reading, Pennsylvania,
Petitioner,

vs.

Geneva M. Nagle, Ralph S. Hill, James H. Pengelly and William M. Mayer,
Respondents.

No. ———

Harvey S. Adams, Receiver, Reading National Bank and Trust Company of Reading, Pennsylvania,
Petitioner,

vs.

J. Edwin Tobias, Ralph S. Hill and Oscar P. Smith,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Your petitioner, Harvey S. Adams, as Receiver of the Penn National Bank and Trust Company of Reading, Pennsylvania, successor to William H. McGowan, former Receiver of said bank, appellee below, and also as Receiver

of the Reading National Bank and Trust Company of Reading, Pennsylvania, respectfully prays that writs of certiorari issue to the United States Circuit Court of Appeals for the Third Circuit to review judgments of that Court entered on March 10, 1937 (R. 96, 97) reversing the decrees of the United States District Court for the Eastern District of Pennsylvania, which dismissed the original bills of complaint in these cases.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Third Circuit was rendered March 10, 1937 (R. 88) and is reported in 88 Fed. (2d) 936. The opinion of the United States District Court for the Eastern District of Pennsylvania, dismissing the original bills of complaint in these cases, was rendered May 1, 1935 (R. 27) and is not reported. The subsequent opinion of the United States District Court dismissing the amended bills of complaint was rendered June 25, 1935 (R. 33) and is not reported.

In view of the similarity of the questions presented in these two cases an order was entered below consolidating them for the purpose of an appeal, and for these reasons both cases have been made the subject of one petition in this Court.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, U. S. C. Title 28, Section 347 (a).

HISTORY OF THE CASE

These suits were commenced in equity in the United States District Court for the Eastern District of Pennsylvania by certain stockholders of the Penn National

Bank and Trust Company and the Reading National Bank and Trust Company, both of Reading, Pennsylvania (hereinafter referred to as the Penn National and Reading National). In each case the Comptroller of the Currency of the United States and the Receiver of the bank were defendants. The purpose of the suits was to enjoin the collection of 100% assessments levied by the Comptroller of the Currency against the stockholders of these two banks and to have said assessments declared illegal and invalid. In each of these cases the Receivers moved to dismiss the bills of complaint (R. 22, 67).

The United States District Court for the Eastern District of Pennsylvania sustained the motions to dismiss and dismissed the original bills of complaint as to the Receivers (R. 27), and subsequently the bills of complaint, as amended, were dismissed (R. 35, 75).

STATEMENT OF FACTS

Respondents herein, appellants below, are stockholders of the Penn National and Reading National banks, which had a capital respectively of $1,000,000.00 and $600,000.00 represented by 100,000 shares and 60,000 shares, of a par value of $10.00 per share (R. 4, 49).

For many years prior to 1933, these banks had conducted a banking business in the city of Reading, Pennsylvania. Prior to March 18, 1933, these banks were "on the verge of insolvency" (R. 6, 51). Thereupon the Comptroller of the Currency placed them in conservatorship, and thereafter, finding them to be insolvent, and unable to pay their debts (Par. 23) (R. 12, 56) the Comptroller placed them in receivership.

After a valuation of their assets and after an accounting from the receiver of each bank (R. 20, 64), the Comptroller officially found that a 100% assessment on shareholders was necessary to pay their debts, and on January 15, 1935 demand was made for payment of the assessment (R. 20, 64).

Notwithstanding the official findings of the Comptroller as to insolvency and the inability of these banks to pay their debts, and his official determination that a 100% assessment on shareholders was necessary, certain stockholders in each bank brought representative suits against the Receiver and the Comptroller, seeking to enjoin the collection of the assessment and to avoid payment of their statutory liability.

The following facts are set forth in the bills of complaint in each case as reasons for avoiding payment of the assessment:

That on February 17, 1933, "in contemplation of a consolidation" the Penn National and Reading National entered into an agreement with the Farmers National Bank and Trust Company of Reading (hereinafter referred to as the Farmers National), which agreement provided for an assumption by the Farmers National of the deposit and other existing liabilities of the Penn National and Reading National, excepting liabilities to shareholders, (R. 5, 50), and for the transfer of the assets of the Penn National and Reading National to the Farmers National. The bills further averred that these three banks entered into a supplemental agreement on February 20, 1933, "at the direction of the Comptroller of the Currency" whereby the Penn National and Reading National guaranteed that their respective assets would exceed in value the deposit and other liabilities assumed by the Farmers National (R. 6, 50); that thereafter there followed a transfer of all the assets of the Penn National and Reading National to the Farmers National and a surrender of control, and subsequently the business of all the banks was conducted by the Farmers National "with the knowledge, approval and acquiescence of the Comptroller of the Currency, his agents and representatives" (R. 6, 51).

It was further averred that prior to the execution of said agreement of February 17, 1933, the Penn National and Reading National were subjected to unusual with-

drawals which placed them "on the verge of insolvency" for which reason the contract of February 17, 1933, and the supplemental contract, were executed (R. 6, 51); that after February 17, 1933 the Penn National and Reading National ceased to control their assets and to transact their banking business; that the assets of the Penn National transferred to the Farmers National exceeded $6,500,000.00 in value and had a fair market value of $5,400,000.00 (R. 7), and that on the same date the assets of the Reading National had a value in excess of liabilities assumed by the Farmers National, which liabilities assumed amounted to $9,000,000.00 (R. 52).

The bills of complaint then stated that the assets of the Penn National and the Reading National were commingled with the assets of the Farmers National (R. 8, 53); that on March 18, 1933 the Acting Comptroller of the Currency appointed a Conservator for the Farmers National who administered the assets of the three banks until October 10, 1933 when the Comptroller directed that the transfer of assets from the Penn National and Reading National to the Farmers National be disregarded, and ruled in effect that the agreements of February 17, 1933 and February 20, 1933 were without legal effect (R. 9, 54); that on October 10, 1933 the Comptroller appointed a Conservator for the Penn National and Reading National (R. 10, 54) and later proposed a plan of reorganization, which involved a sale of certain assets to a national bank newly to be organized and a division of the proceeds of such sale among the creditors of the Farmers National and the Penn National and Reading National (R. 10, 55); and subsequently dividends were paid from such proceeds to creditors of the three banks.

The bills of complaint then stated that the Conservator disregarded the claims of the Penn National against the Farmers National in approximate amount of $5,100,000.00, and the claim of the Reading National against the Farmers

National in the approximate amount of $9,000,000.00, and that the Comptroller, Conservator and Receiver neglected and refused to collect these claims of the Penn National and Reading National against the Farmers National, which claims were the only resources available to the banks to pay their creditors; and that in arriving at the valuation of the assets and determining insolvency these claims against the Farmers National were disregarded (R. 13, 57).

It was further averred that on January 15, 1935 the Comptroller of the Currency made an assessment on the shareholders of the Penn National and Reading National *"upon a proper accounting by the Receiver"* and *"upon a valuation of the uncollected assets remaining in his hands,"* (R. 12, 56) having found after such accounting and valuation that the assessment was necessary in order to pay the debts due from the Penn National and Reading National to their creditors (R. 20, 64); but that said assessment was illegal and invalid (R. 13, 58) because the Comptroller acted upon an "unwarranted assumption of judicial power" (R. 13, 57) in waiving and cancelling said claims against the Farmers National.

Summed up, the only contention advanced by the averments of the bills of complaint is that although the Comptroller officially found that the banks were insolvent, and although after an accounting from the Receivers and a valuation of the assets in their hands, the Comptroller found that the assets of the Penn National and Reading National were insufficient to pay the claims of their creditors, and officially determined that 100% assessments on shareholders were necessary in order to pay such claims, nevertheless the stockholders say that in arriving at this conclusion, which was within his official discretion to make, the Comptroller failed to give proper value to certain alleged claims of the Penn National and Reading National against the Farmers National which claims, had they been properly evaluated, would have made the assessments unnecessary.

SPECIFICATIONS OF ERRORS

The United States Court of Appeals for the Third Circuit erred:

1. In reviewing the act of the Comptroller of the Currency performed in the exercise of official judgment and discretion determining that 100% assessments were necessary upon the stockholders of the Penn National and Reading National banks in order to pay the debts of those insolvent associations.

2. In reviewing the official determination by the Comptroller of the Currency that the Penn National and Reading National were insolvent and unable to pay their debts.

3. In holding that notwithstanding the determination by the Comptroller, arrived at in the exercise of official judgment and discretion after an accounting from the Receiver of each of these banks and a valuation of the assets, nevertheless the ensuing assessments were invalid.

4. In holding that the Comptroller of the Currency did not have the right to disregard the agreement of February 17, 1933, to re-transfer their assets to the Penn National and Reading National, and to levy assessments upon shareholders of these associations, when he officially found that such action was necessary to pay their debts.

5. In holding in effect that the executory contract of February 17, 1933, and the transfer of assets of the Penn National and Reading National to the Farmers National, and the resulting intermingling of the assets, created a merger or consolidation of the banks which the Comptroller could not set aside.

6. In permitting the stockholders to set up their judgment as to the value of the assets of the Penn National and Reading National, and their opinion as to the necessity for the assessments upon shareholders of these insolvent associations, against the official determination of the Comptroller to the contrary.

QUESTIONS PRESENTED

1. Can the stockholders attack the official finding and determination of the Comptroller as to insolvency of the Penn National and Reading National banks, and the necessity for assessments on their shareholders, arrived at in the course of his official judgment and discretion after an accounting from the Receivers and a valuation of the banks' assets?

2. Did the Comptroller of the Currency have a right to disregard the attempted merger of the Penn National and Reading National with the Farmers National growing out of the agreement of February 17, 1933?

3. Did the transfer of assets of the Penn National and Reading National to the Farmers National, and their subsequent intermingling, resulting from the contract of February 17, 1933, create a legal merger or consolidation of the banks which the Comptroller of the Currency was bound to recognize?

4. Did the attempted merger of the Penn National and Reading National with the Farmers National, as a result of the contract of February 17, 1933, create any claims in favor of the first mentioned banks which the Comptroller was bound to consider before levying the assessments on stockholders of these two insolvent associations?

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Upon the questions presented and the authorities hereinafter cited, it is respectfully submitted that a writ of certiorari should be granted for the following reasons:

1. The United States Circuit Court of Appeals for the Third Circuit has decided an important question of Federal law in a manner in conflict with applicable decisions of this Court, and in conflict with decisions of United States Circuit Courts of Appeal other than the Third Cir-

cuit, and in conflict with its own decisions, upon the question of the right of shareholders in national banking associations to inquire into the correctness of the official determinations and findings of the Comptroller of the Currency as to insolvency and the necessity for an assessment. Although these equity proceedings are in the guise of a direct attack, as distinguished from a collateral attack upon the Comptroller's official findings in these matters, nevertheless they constitute an inquiry into the correctness of those findings which is not permitted by law.

The bills of complaint show (Par. 24—R. 12, 56) that the Comptroller of the Currency officially determined, after an accounting from the Receiver and after a valuation of the remaining assets in the Receiver's hands, that he was satisfied that it was necessary to enforce the individual liability of the stockholders in order to pay the debts of these insolvent banks (R. 20, 64). To allow the stockholders to challenge these official determinations and findings would be to permit an attack and inquiry not permitted by law.

The rule governing the right of the Comptroller to determine the question of insolvency and the necessity for an assessment on shareholders in national banking associations is laid down by this Court in the following cases, among others:

Kennedy v. *Gibson*, 8 Wall. 498
Casey v. *Galli*, 94 U. S. 673
National Bank v. *Case*, 99 U. S. 628
Bushnell v. *Leland*, 164 U. S. 684
Forrest v. *Jack*, 294 U. S. 158—733.

The same rule is laid down by other Circuits in recent decisions, illustrative of which are the following:

Collins v. *Caldwell*, 29 Fed. (2) 329, CCA 5
Chase v. *Hall*, 30 Fed. (2) 195, CCA 9
Crawford v. *Gamble*, 57 Fed. (2) 15, CCA 6
Wannamaker v. *Edisto Bank*, 62 Fed. (2) 696, CCA 4
Schram v. *Schwartz*, 68 Fed. (2) 699, CCA 2

Emery & Co. v. *Wilkinson*, 72 Fed. (2) 10, CCA 10
O'Connor v. *Watson*, 81 Fed. (2) 833, 836, CCA 5
Meeker v. *Baxter*, 83 Fed. (2) 183, CCA 2
Silk v. *Ake*, 83 Fed. (2) 618, CCA 6.

The same rule is laid down by the Circuit Court of Appeals for the Third Circuit in the case of *Miller* v. *Stock*, 65 Fed. (2) 773. *It should be noted that there is a strong dissenting opinion in the instant case wherein this case is cited.*

The effect of the decision in this case is to permit an inquiry by the stockholders as to the correctness of the Comptroller's decision and official determination of insolvency and the necessity for an assessment, and to require an accounting as to the value of the assets in order to determine the necessity for the assessment, notwithstanding the fact that the record shows (R. 12, 56) that the Comptroller has already officially determined that the assets are of insufficient value to pay the debts of these banks.

2. The decision of the United States Circuit Court of Appeals for the Third Circuit reversing the United States District Court appears to be erroneous for the following reasons:

(a) *It ignores the fact that the Comptroller of the Currency had the right to set aside the attempted merger because no legal consolidation resulted from the contract of January* 18, 1930.

The National Bank Act (Section 33, Title 12, U. S. C. A.) sets forth the method whereby two or more national banking associations may consolidate. Among the mandatory requirements for a completed and valid consolidation are:

1. Agreement upon the terms of consolidation by a majority of the Board of Directors.
2. Confirmation by the affirmative vote of two-thirds of the shareholders.
3. Publication.
4. Approval of the consolidation by the Comptroller or the Currency.

The Courts have held that compliance with these statutory requirements must be had before a legal consolidation can result.

Ex parte Worchester County National Bank, 279 U. S. 347
McCormick v. *Market National Bank*, 165 U. S. 538
Benedict v. *Anderson*, (3 C. C. A.) 70 Fed. (2) 227
Hiatt v. *Peddy* (5 C. C. A.) 73 Fed. (2) 235.

In its opinion in the instant case the Court below said:

> "The crux of this case centers in the right of the Comptroller to abrogate and set aside the contract in accordance with which the Penn and Reading banks conveyed their assets to the Farmers Bank, in consideration for which the Farmers Bank agreed to pay the obligations of the other two banks."

The record does not disclose that these mandatory requirements were met or in any way complied with by the banks signatory to the contract of February 17, 1933. It follows that since no legal consolidation was accomplished the Comptroller had the right to restore the banks to their original status by declaring that the attempted merger or consolidation had failed of completion. Having this right, the Comptroller of the Currency acted properly in disregarding the merger, returning the assets of the respective banks to the conservators, appointing receivers for the banks and in levying the stock assessments. A mere intermingling of assets of two or more national banks does not create a consolidation which the Comptroller cannot ignore and set aside, nor does it work an estoppel upon the right of the Comptroller of the Currency to levy an assessment when he finds such action necessary.

Hightower v. *American National Bank*, 263 U. S. 351;
Fuller v. *City National Bank of Huron*, 52 Fed. (2) 865-870; 8 CCA;
Stevens v. *Hamilton*, 81 Fed. (2) 324, 7 CCA.

(b) *Assuming that a merger as distinguished from a legal consolidation had resulted, still the Comptroller could levy assessments on the stockholders of the Penn National and Reading National if he found it necessary, and could collect such assessments through his receivers.*

The cases hold that where one bank merges with another, such merger does not amount to a legal consolidation; and if the merged bank goes into voluntary liquidation nevertheless the right of the Comptroller of the Currency to levy an assessment on the stockholders of the merged bank remains unaffected.

> *Washington National Bank* v. *Eckles*, 57 Fed. 870;
> *Liberty Bank* v. *McIntosh*, 16 Fed. (2) 906;
> *Stevens* v. *Hamilton*, 81 Fed. (2) 324, 7 CCA;
> *O'Connor* v. *Watson*, 81 Fed. (2) 833, CCA 5—Cer. Den. 298 U. S. 657.

(c) *The decision of the Court below assumes that the agreement of February* 17, 1933, *contemplating a merger, originated with and was consented to by the Comptroller.*

The bill of complaint (Par. 6) (R. 5, 49) and the contract itself (R. 15, 60) show that the banks originated the plan to "merge", which resulted in the contract of February 17, 1933. The Comptroller of the Currency was not a party signatory or otherwise to the contract of February 17, 1933 (R. 15, 16). There is nothing in the averments of the bills of complaint in either case, or in the contract itself, that would indicate that the plan to "merge" the Penn National and the Reading National with the Farmers National originated with the Comptroller or was consented to by him. The contract was at most executory and, to validate it, the approval and consent of the Comptroller was necessary; and there is no averment contained in the bills of complaint that such approval or consent was obtained.

But in any event the Comptroller of the Currency did not "abrogate or set aside" any contract rights of the

contracting parties as assumed by the Court below, nor did he disturb any legal rights accruing thereunder. The Comptroller merely acted on the situation as he found it, (no executed contract) and determined the rights of the respective banks in so far as the contract had been executed and returned the assets to their representatives.

3. The decision and judgment as it stands calls for an immensely complicated inquiry into the value of assets and this many years after the contract and attempted merger occurred.

The practical effect of such a proceeding would delay indefinitely the liquidation and winding up of the affairs of these banks and the distribution to creditors. It is respectfully submitted that such was not the intention of Congress nor the correct meaning of the decisions construing the national banking laws applicable to such a situation. This Court has held that the intention of the law was to promote a speedy liquidation for the benefit of creditors.

> "A speedy adjustment is necessary to the efficiency and utility of the law; the interest of the creditors require it and it was the obvious policy and purpose of Congress to give it."
>
> *Kennedy* v. *Gibson,* 8 Wall. 498, 505, 506.

And in this connection the court below said in *Miller* v. *Stock:*

> "We are admonished by the Supreme Court that it is the duty of Federal Courts to act promptly in aiding the Comptroller in enforcing the liability of shareholders—in pursuance thereof we act with promptness in disposing of this case and no longer delaying the enforcement of the Comptroller's assessment made September 28, 1931."

To permit an inquiry of the kind, which must necessarily result as the opinion of the Court below stands, would be to set a precedent not sanctioned by this Court or even by the former decision of the Court below.

4. The United States Circuit Court of Appeals for the Third Circuit has decided a question of general importance adversely to thousands of creditors and depositors of these insolvent banks in process of liquidation under direction of the Comptroller and contrary to well established rules and principles laid down by the Federal cou.ts.

The reasons advanced for invalidating the Comptroller of the Currency's assessment are at most technical and should not be permitted to react unfavorably against such a large group of creditors.

This Court has held that this double liability for assessment is for the protection of creditors (See *Christopher* v. *Norvell*, 201 U. S. 216, 225), and that a technical construction should not be resorted to for the purpose of defeating their interests (*Korbly* v. *Springfield Institution for Savings*, 245 U. S. 330, 333).

5. The decision of the Court below establishes a precedent heretofore unsanctioned by this Court, and involves a vital and important question arising under the national banking laws which is of fundamental importance in the liquidation of a large number of national bank receiverships throughout the country. It is believed that the decision below has far reaching effect with reference to the right of inquiry by stockholders into the official determinations and findings of the Comptroller of the Currency, and their right to question his valuations of assets and his determinations as to insolvency and the necessity for levying an assessment on stockholders. It is believed that the Court should assume jurisdiction in this case in order that such a decision, contrary to all precedent, should not be permitted to delay the liquidation of banks and the early distribution of the proceeds of liquidation to creditors.

WHEREFORE, it is respectfully submitted that this petition should be granted.

BRICE CLAGETT
CHARLES E. WAINWRIGHT
CHARLES W. MATTEN
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 123.

HARVEY S. ADAMS, RECEIVER, PENN NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA,
Petitioner,

vs.

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY AND WILLIAM M. MAYER,
Respondents.

No. 124

HARVEY S. ADAMS, RECEIVER, READING NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA,
Petitioner,

vs.

J. EDWIN TOBIAS, RALPH S. HILL AND OSCAR P. SMITH,
Respondents.

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION.

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
CHARLES W. MATTEN,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION.

In their brief in opposition the respondents make the point that the petition for writ of certiorari should be denied because the Comptroller of the Currency did not join in the petition and because the record fails to show service of summons and severance upon him. This reply is directed solely to this question of procedure.

It is respectfully submitted that it was not necessary that the Comptroller should have joined in the petition, or that service of summons and severance should have been had upon him, for the following reasons:

1. The Comptroller of the Currency was not an Appellee Below.

The record shows (R. 26, 70) that the Comptroller of the Currency filed in the District Court motions to quash service of process upon him, and those motions were sustained and the bills of complaint were as to him dismissed, (R. 35, 75). The motions to dismiss the bills of complaint were filed in the District Court by the receivers in each case, and the Comptroller of the Currency did not join in such motions (R. 22, 67), but appeared specially for the sole purpose of challenging the jurisdiction of the Court over his person, and filed his own separate motions to quash service of process and to dismiss the bills of complaint as to him, (R. 26, 70). The opinion of the Court below (R. 93) refers to the motions to dismiss the bills of complaint as "*His motions* to dismiss the bills admit the allegations, etc.", meaning the Comptroller's, but the record shows (R. 22, 67) that the Comptroller never joined in these motions. For these reasons the Comptroller was never an appellee in the cases below and the appearance of his name in the captions did not make him such. The cases had already been dismissed as to him and that action of the District Court was not reversed.

Inasmuch as the opinion of the Court in no way discussed the sustaining of the motions to quash service of process upon the Comptroller and the resulting dismissal of the bills of complaint as to him, and inasmuch as the opinion of the Court below is directed solely to the orders dismissing the bills of complaint and denying preliminary injunctions, and reverses only that action of the District Court, (R. 94), it must be assumed that the discussion con-

tained in the opinion of the Court below was directed to the receivers as agents and representatives of the Comptroller in enforcing the stock assessment.

2. The Comptroller of the Currency was not a Necessary Party to the Petition.

Had the Comptroller been an appellee in the cases below, as we contend he was not, nevertheless he would not have been a necessary party to the petition for writ of certiorari. He was represented in the appeals by his agents, the receivers, and a decree of the Court binding the receivers would operate equally to bind the Comptroller, in so far as the administration and liquidation of the insolvent banks was concerned. *Earle* v. *Pennsylvania*, 178 U. S. 449; *Taylor* v. *Spurway*, 72 Fed. (2) 97-99.

The receiver of an insolvent national bank is an instrument or agent of the Comptroller of the Currency in all matters involving the liquidation of the insolvent bank.

Kennedy v. *Gibson*, 8 Wall. 498;
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Hulse v. *Argetsinger*, 18 Fed. (2) 944;
Lehman v. *Spurway*, 58 Fed. (2) 227, cert den. 287 U. S. 621.

Thousands of cases are instituted yearly against national bank receivers in the Courts throughout the country without joining the Comptroller as a party defendant and a decree or judgment against such receivers is given its proper recognition.

3. The Rule Pertaining to Service of Summons and Severance is not Applicable.

The rule pertaining to service of summons and severance applies in cases where a decree has been rendered against two or more defendants requiring the joint performance or the refraining from the doing of some act. The purpose

for applying the rule is to prohibit the prosecution of an appeal piecemeal. The decrees below dismissing the bills of complaint and denying the preliminary injunctions were merely decrees entered on motions to dismiss the bills of complaint and were not decrees involving joint performance or restraint. The opinion and judgments below do not have the effect of sustaining a decree of the trial Court enjoining the Comptroller and receiver from proceeding with the enforcement of the assessment. The effect of the judgments of the Court below is merely to require the receiver to answer.

The rules as to summons and severance discussed in the case of *Boynton* v. *Hutchinson Gas Company*, 292 U. S. 601, cited in respondents' brief, and the cases of *Maytin* v. *Vela*, 216 U. S. 598, *Journeyman Stone Cutters' Association* v. *United States*, 278 U. S. 566, *Newton* v. *Consolidated Gas Company*, 264 U. S. 571, 265 U. S. 78, cited in the *Boynton* case, are not in point, since those cases involved joint decrees requiring joint performance by the parties affected.

It is respectfully submitted that it was not necessary to join the Comptroller of the Currency as a party to the petition and the rule as to service of summons and severance can not be invoked as a ground for denying the petition.

Respectfully submitted,

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
CHARLES W. MAPTEN,
Attorneys for Petitioner.

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Supreme Court of the United States

OCTOBER TERM 1937

No. 123

HARVEY S. ADAMS, RECEIVER, PENN NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA,

Petitioner,

VS.

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY AND WILLIAM M. MAYER.

No. 124

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VS.

J. EDWIN TOBIAS, RALPH S. HILL AND OSCAR P. SMITH.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States Circuit Court of Appeals for the Third Circuit was rendered March 10, 1937 (R. 66-74) and is reported in 88 Fed. (2) 936. The opinion

of the United States District Court for the Eastern District of Pennsylvania, dismissing the original bills of complaint in these cases, was rendered May 1, 1935 (R. 20-22) and is not reported. The subsequent opinion of the United States District Court dismissing the amended bills of complaint was rendered June 25, 1935 (R. 24-25) and is not reported.

Jurisdiction

This Court has jurisdiction of these cases under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 347).

History of the Cases

These suits were commenced in equity in the United States District Court for the Eastern District of Pennsylvania by certain stockholders of the Penn National Bank and Trust Company and the Reading National Bank and Trust Company, both of Reading, Pennsylvania (hereinafter referred to as the Penn National and Reading National). In each case the Comptroller of the Currency and the Receiver of the bank were the defendants. The relief sought in each suit was to enjoin the collection of 100% assessments levied by the Comptroller against the stockholders of these two banks, and to have said assessments declared illegal and invalid.

In each case the defendant Receivers moved to dismiss the bills of complaint (R. 16, 49) and the amended bills of complaint (R. 24, 54) and the Comptroller moved for other reasons to quash process and dismiss the bills of complaint as to him (R. 19, 51). Subsequently both motions were sustained, and the amended bills of complaint were dismissed by orders entered June 25, 1935 (R. 25, 55).

Appeals were subsequently taken and allowed (R. 29, 59). In view of the fact that the questions raised in the two cases were exactly similar, orders were entered below (R. 32, 61) consolidating them for purposes of appeal and permitting

the printing of a joint record; and for this reason both cases were made the subject of one petition in this Court for writs of certiorari.

The United States Circuit Court of Appeals for the Third Circuit reversed the United States District Court for the Eastern District of Pennsylvania by its orders entered March 10, 1937 (R. 74, 75), and denied petition for rehearing on April 19, 1937 (R. 76), whereupon the Receiver in each case petitioned this Court for writs of certiorari to review the orders of the Court below, which petition was granted on October 11, 1937 (R. 78).

Statement of Facts

Respondents herein, appellants below, are stockholders of the Penn National and Reading National banks, which banks had a capital of One Million Dollars ($1,000,000.00) and Six Hundred Thousand Dollars ($600,000.00) respectively, represented by One Hundred Thousand (100,000) shares and Sixty Thousand (60,000) shares of a par value of Ten Dollars ($10.00) per share (R. 3, 36).

For many years prior to 1933 these banks had conducted a banking business in the City of Reading, Pennsylvania. The banks were not permitted to reopen after the President's Proclamation of March 6, 1933, closing all banks, and subsequently the Comptroller found that it was necessary to take steps to conserve their assets for the benefit of their creditors, and thereupon placed them in conservatorship under the Bank Conservation Act of March 9, 1933 (R. 8, 40). Thereafter, having found that both banks were insolvent and unable to pay their debts, the Comptroller placed them in receivership (R. 9, 42).

Subsequently, on January 15, 1935, after a *valuation of their assets and after an accounting from the receiver of each bank* (R. 14, 47) the Comptroller officially found that 100% assessments were necessary to pay their debts; whereupon the Comptroller levied the assessments and

made demand upon the shareholders for payment of their stock assessment liability (R. 14, 47).

Notwithstanding the fact that admittedly as early as February 17, 1933, the banks were *"subjected to unusual withdrawals of deposits"* resulting in reserve deficiencies and placing them *"on the verge of insolvency"* (R. 5, 37—Par. 8); and notwithstanding the admitted official findings of the Comptroller as to insolvency of the banks and their inability to pay their debts, and his official determination that 100% assessments upon shareholders were necessary in order to pay creditors, certain stockholders in each bank brought these representative suits against the receivers and the Comptroller, seeking to enjoin the collection of the assessments, and thus to avoid payment of their statutory liability to creditors.

Your petitioner appears as the petitioning receiver in each of these cases, having been appointed originally as Receiver of the Reading National, and having succeeded William H. McGowan, resigned, as receiver of the Penn National.

Inasmuch as the facts upon which respondents base their alleged right to injunctions, and to avoid payment of their stock assessment liability, appear in the bills of complaint, and inasmuch as the legal principles applicable to these facts will test the correctness of the rulings of the Court below, it becomes necessary to analyze the bills of complaint which contain the following factual averments:

Prior to February 17, 1933, the Penn National and Reading National banks were *"subjected to unusual withdrawals of deposits,"* resulting in reserve deficiencies and placing them *"on the verge of insolvency"* (R. 5, 37—Par. 8). Because of this emergency, and *"in contemplation of a consolidation with Farmers National Bank"* (R. 4, 37—Par. 6), on that date the Penn National and the Reading National entered into an agreement with the Farmers National Bank and Trust Company of Reading (hereinafter referred to as the Farmers National) through their respective Boards of Directors. This agreement (R. 11, 44) provided for a

"merger" of the three banks under the name of the Farmers National *"subject to the approval of the Comptroller of the Currency and all other Governmental authorities whose consent will be required to comply with all legal requirements."*

The agreement further provided for an assumption by the Farmers National of the deposit and other existing liabilities of the Penn National and Reading National excepting liability to shareholders (R. 4, 37—Par. 6), and for the transfer of their assets by the Penn National and Reading National to the Farmers National.

It is further averred that these three banks entered into a supplemental agreement on February 20, 1933 (R. 13, 46) whereby the Penn National and Reading National guaranteed that their respective assets would exceed in value the deposit and other liabilities assumed by the Farmers National (R. 4, 37—Par. 7). The bills then aver that thereafter there followed a transfer of all the assets of the Penn National and the Reading National to the Farmers National, and a surrender of control, and that subsequently the Penn National and the Reading National ceased to transact their banking business and the business of all three banks was conducted by the Farmers National *"with the knowledge, approval and acquiescence of the Comptroller of the Currency, his agents and representatives"* (R. 5, 37—Par. 9).

It is further averred that the assets of the Penn National transferred to the Farmers National exceeded $6,500,000.00 in value, or $350,000.00 over and above the Penn National's liabilities, and had a fair market value of $5,400,000.00 (R. 5—Pars. 10, 12), and that the assets of the Reading National transferred to the Farmers National had a value in excess of the liabilities assumed by the Farmers National, which liabilities amounted to $9,000,000.00 (R. 38—Par. 10, 11); and that the assets of the Farmers National had a book value of approximately $9,500,000.00 and a fair market value of $8,000,000.00 (R. 23, 53).

It is then averred that the assets of the Penn National and Reading National were commingled with the assets of the Farmers National, which bank became liable to perform the agreements of February 17 and 20, 1933, and became liable to the Penn National and Reading National for the payment of all their deposit and other liabilities (except liabilities to stockholders) which amounted to $5,100,000.00 in the case of the Penn National and $9,000,000.00 in the case of the Reading National (R. 6, 39—Par. 13). The legal conclusion is that these alleged claims of the Penn National and the Reading National against the Farmers National constituted a trust fund for payment of creditors and that the assets transferred to the Farmers National were impressed with an equitable lien in their favor, and that such claims are *"more than sufficient in the ordinary course of liquidation to pay and discharge all liabilities"* of the Penn National and Reading National *"without the necessity of any assessment upon the stockholders"* (R. 25, 53).

It is then averred that on March 18, 1933, the Acting Comptroller appointed a Conservator for the Farmers National, (R. 6, 39—Par. 15) who administered the assets of the three banks until October 10, 1933, when the Comptroller directed that the transfer of assets should be disregarded, re-allocated their assets among the three banks (R. 7, 40—Par. 17), and appointed conservators for the Penn National and Reading National; and that the Comptroller later proposed a plan of reorganization which contemplated a sale of certain of the banks' assets to a national bank newly to be organized, and a division of the proceeds of such sale among the three banks, which was subsequently done (R. 8, 41—Par. 19, 20).

It is then averred that the Conservator of the Penn National disregarded its claim against the Farmers National in the approximate amount of $5,100,000.00 and the Conservator of the Reading National disregarded its claim against the Farmers National in the approximate amount of $9,000,000.00 (R. 8, 41—Par. 21) and that subsequently the

Comptroller, Conservator and Receiver neglected and refused to collect these claims of the Penn National and Reading National against the Farmers National (R. 9, 42—Par. 25) which claims were the only resources available to the banks to pay their creditors; and that in arriving at the valuation of the assets and in determining insolvency these claims of the Penn National and Reading National against the Farmers National were disregarded and excluded (R. 10, 42—Par. 26).

It is further averred that on January 15, 1935, the Comptroller of the Currency made an assessment on the shareholders of the Penn National and Reading National *"upon a proper accounting by the Receiver"* and *"upon a valuation of the uncollected assets remaining in his hands"* (R. 9, 42—Par. 24) having found after such accounting and valuation that the assessment was necessary in order to pay the debts due from the Penn National and Reading National to their creditors (R. 15, 47); but that said assessment was illegal and invalid because the Comptroller acted upon an "unwarranted assumption of judicial power" (R. 10, 42—Par. 26) in waiving and canceling the claims of the Penn National and Reading National against the Farmers National.

The relief prayed is that the Comptroller's assessment against stockholders of the Penn National and Reading National be declared invalid, and that the enforcement thereof be enjoined.

Summed up, the only contention advanced by the averments of the bills of complaint in these cases is that although the Comptroller officially found that the banks were insolvent, and although after an accounting from the Receivers and a valuation of the assets in their hands, the Comptroller of the Currency found that the assets of the Penn National and Reading National were insufficient to pay the claims of their creditors and officially determined that 100% assessments on shareholders were necessary in order to pay such claims; nevertheless the stockholders say

that in arriving at this conclusion, which was within his official discretion to make, the Comptroller failed to give proper value to certain alleged claims of the Penn National and Reading National against the Farmers National, which claims, had they been properly evaluated and had they been pursued and enforced, would have made the assessments unnecessary.

Specifications of Errors

The United States Court of Appeals for the Third Circuit erred:

1. In reviewing the act of the Comptroller of the Currency, performed in the exercise of official judgment and discretion, determining that 100% assessments upon the stockholders of the Penn National and Reading National banks were necessary in order to pay the debts of those insolvent associations.

2. In reviewing the official determination by the Comptroller of the Currency that the Penn National and Reading National were insolvent and unable to pay their debts.

3. In holding that notwithstanding the determination by the Comptroller, arrived at in the exercise of official judgment and discretion after an accounting from the Receiver of each of these banks and a valuation of the assets, nevertheless the ensuing assessments were invalid.

4. In holding that the Comptroller of the Currency did not have the right: (a) to disregard the agreement of February 17, 1933; (b) to retransfer their assets to the Penn National and Reading National; and (c) to levy assessments upon shareholders of these associations, when he officially found that such action was necessary to pay their debts.

5. In holding in effect that the executory contract of February 17, 1933, and the transfer of assets of the Penn Na-

tional and Reading National to the Farmers National, and the resulting intermingling of the assets, created a merger or consolidation of the banks which the Comptroller could not set aside.

6. In permitting the stockholders to set up their judgment as to the value of the assets of the Penn National and Reading National, and their opinion as to the necessity for the assessments upon shareholders of these insolvent associations, against the official determination of the Comptroller to the contrary.

Questions Presented

1. Can the stockholders by these proceedings attack the official finding and determination of the Comptroller as to insolvency of the Penn National and Reading National banks, and the necessity for assessments on their shareholders, arrived at in the course of his official judgment and discretion after an accounting from the Receivers and a valuation of the banks' assets?

2. Did the Comptroller of the Currency have a right to disregard the attempted merger of the Penn National and Reading National with the Farmers National growing out of the agreement of February 17, 1933?

3. Did the transfer of assets of the Penn National and Reading National to the Farmers National, and their subsequent intermingling, resulting from the contract of February 17, 1933, create a legal merger or consolidation of the banks which the Comptroller of the Currency was bound to recognize?

4. Did the attempted merger of the Penn National and Reading National with the Farmers National, as a result of the contract of February 17, 1933, create any claims in favor of the first mentioned banks against the Farmers National which the Comptroller was bound to consider before levying the assessments on stockholders of these two insolvent associations?

SUMMARY OF ARGUMENT

I. Stockholders in National Banks Can Not Attack the Comptroller's Findings and Decisions Upon the Questions of Insolvency of the Bank, and the Necessity for and the Amount of the Assessment, His Decisions and Action in That Regard Being Final.

II. The Comptroller Was Not Bound by the Attempted "Merger" of the Three Banks Because

(A) No legal consolidation resulted from the contract of February 17, 1933.

(B) A "consolidation" and a "merger" are not the same; and the mere commingling of the assets of the three banks did not create a legal consolidation.

(C) The Contract was executory and the steps outlined therein to make it an executed contract were not completed; but even if a "merger" had resulted, still the Comptroller could levy assessments on the stockholders of the Penn National and the Reading National, if he found it necessary, and could collect such assessments through his receivers.

(D) The mere contracting by the Farmers National to assume the liabilities of the Penn National and Reading National did not relieve the last mentioned banks from their obligations unless and until the Farmers National actually performed by payment of the liabilities assumed.

III. The Sale of Assets by the Conservator to the Newly Organized National Bank, and the Distribution of the Proceeds of Such Sale, Was Valid and Proper.

IV. Respondents Are Guilty of Laches.

V. Speedy Action Is Necessary in Collecting the Assessment in Order That the Rights of Creditors May Be Protected.

VI. Conclusion.

ARGUMENT

I

Stockholders in National Banks Can Not Attack the Comptroller's Findings and Decisions Upon the Questions of Insolvency of the Bank, and the Necessity for and the amount of the Assessment, His Decisions and Action in that Regard Being Final.

The averments of the bills of complaint, as amended, when considered in their entirety, amount merely to stating that the assessments are invalid and illegal since, if the assets had been considered at their proper valuation, and if all claims and causes of action of the Penn National and Reading National had been first pursued and exhausted, there would have been no necessity for the levying and enforcement of the assessment. That this is the sole theory and basis relied upon by the respondents is made clear from such averments as that the Comptroller *"ignored and disregarded the claims"* of the Penn National and Reading National against the Farmers National (R. 8, 41—Par. 21); that the Comptroller, Conservator and Receiver of the Penn National and Reading National *"failed, neglected and refused to collect said claim * * * which was the only and ordinary resource * * * for payment of its creditors"* (R. 9, 42—Par. 25); that *"The alleged valuation of the remaining assets made by said defendant, J. F. T. O'Connor, Comptroller of the Currency, upon an alleged proper accounting, on which said assessment * * * was made, excluded as an asset"* the claims of the Penn National and Reading National against the Farmers National *"whereby the said assessment is invalid and illegal"* (R. 10, 42—Par. 26); and that the assets of the Penn National and Reading National, as commingled with the assets of the Farmers National, were subject to an equitable lien and constituted a trust fund in favor of creditors, which claim, in the case of each bank *"was then and now is more than*

*sufficient in the ordinary course of liquidation to pay and discharge all liabilities * * * without the necessity of any assessment upon the stockholders''* (R. 23, 54—Par. 14a).

Whether appearing as a defense to a suit at law in which the shareholder is a defendant, or whether asserted in a suit in equity in which the shareholders are plaintiffs, such averments as those contained in the bills of complaint are nothing more than an attempt to attack collaterally the Comptroller's finding and determination of insolvency and the necessity for the assessment. Such an attack can not be made and such defenses can not be asserted in a suit at law against a stockholder to enforce the assessment, or in direct proceedings such as these to enjoin enforcement of the assessment, which are nothing more than collateral attacks in the guise of direct attacks.

If the direct attack sets up nothing more than is forbidden to be set up in a collateral attack, such an attack is equally futile. *Trustees of Somerset Academy vs. Picher*, 90 Fed. (2) 741 (CCA 1), where the suit was in equity to enjoin collection of the assessment, but the Court held that even so disguised, it was merely a collateral attack not permitted by law. In that case the Ticonic National entered into a contract with the Peoples National whereby all depositors of the former would be paid in full and its liabilities assumed by the latter. The facts are almost identical with those in the instant cases. The Ticonic National went into liquidation and the Comptroller levied an assessment against its stockholders after an official determination of the necessity of such action to pay the bank's debts, which precipitated the suit, the stockholders contending that a note obligation of the Ticonic National was invalid, to satisfy which an assessment could not be made.

By an unbroken line of decisions this Court has established the unquestioned rule that the findings of the Comptroller and his resulting determination of the existence of insolvency, the necessity for an assessment and the amount thereof, are the equivalent of a judicial determination, which

is binding upon the bank, its stockholders and creditors, and which cannot be collaterally attacked. As early as 1869 this Court said in *Kennedy vs. Gibson*, 8 Wall, 498, at page 505:

> "It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders can not controvert it. *It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him.*" (Italics ours.)

See also to the same effect:

Casey vs. Galli, 94 U. S. 673;
Germania National Bank vs. Case, 99 U. S. 628;
United States vs. Knox, 102 U. S. 422;
Bushnell vs. Leland, 164 U. S. 684;
McDonald vs. Thompson, 184 U. S. 71;
McClaine vs. Rankin, 197 U. S. 154;
Rankin vs. Barton, 199 U. S. 228;
Forrest vs. Jack, 294 U. S. 158.

The rule has been followed in a long line of decisions of United States Circuit Courts of Appeal other than the Third Circuit, illustrative of which are the following recent cases:

Collins vs. Caldwell, 29 Fed. (2) 329 (CCA 5);
Chase vs. Hall, 30 Fed. (2) 195 (CCA 9);
Crawford vs. Gamble, 57 Fed. (2) 15 (CCA 6);
Wannamaker vs. Edisto Bank, 62 Fed. (2) 696 (CCA 4);
Schram vs. Schwartz, 68 Fed. (2) 699 (CCA 2);
Emery & Co., vs. Wilkinson, 72 Fed. (2) 10 (CCA 10);
O'Connor vs. Watson, 81 Fed. (2) 833 (CCA 5);
Meeker vs. Baxter, 83 Fed. (2) 183 (CCA 2);
Silk vs. Ake, 83 Fed. (2) 618 (CCA 6);
Barbour vs. Thomas, 86 Fed. (2) 510 (CCA 6);
Dunn vs. O'Connor, 89 Fed. (2) 820 (App. D. C.).

Prior to the decision of the Court below in these cases the rule had been recently followed in the Third Circuit in the case of *Miller vs. Stock*, 65 Fed. (2) 773 where the Court followed the case of *Kennedy vs. Gibson*, supra, and refused to permit the stockholders to assert the defenses that the assets of the bank were sufficient to pay its debts, that the bank was solvent, and that the Comptroller had no sufficient evidence to justify the making of the assessment.

It should be noted that the case of Miller vs. Stock was made the basis of a strong dissenting opinion in the Court below; also that there is no difference between the theories advanced by the stockholders in that case and in these cases to avoid payment of their stock assessment liability.

These suits are in form direct attacks upon the findings of the Comptroller of the Currency as to the necessity for the assessment in order to pay the debts of these two national banks. The Court below in its opinion states as follows:

> "The real question is whether or not in making the assessment the Comptroller transcended the power and authority conferred upon him by Congress." (R. 66.)
>
> "The crux of this case centers in the right of the Comptroller to abrogate and set aside the contract in accordance with which the Penn and Reading banks conveyed their assets to the Farmers Bank, in consideration for which the Farmers bank agreed to pay the obligations of the other two banks." (R. 68.)

Having stated the questions the Court proceeds to state that the Comptroller, in reaching his conclusions as to the necessity for the assessment "may not act arbitrarily, capriciously and in entire disregard of the provisions of the statute" (R. 69); and further

> "But no case has gone so far as to hold that the Comptroller may entirely disregard the statutory provision for winding up an insolvent bank and arbitrarily, and in violation of law, enforce the individual liability

of stockholders. But this is exactly what the Comptroller did in this case." (R. 70.)

"He thus, without authority and contrary to law tried to create a new situation upon which he determined the necessity of enforcing individual liability of stockholders." (R. 70.)

And the Court states further,

"The Comptroller exceeded his power and authority when he abrogated and set aside the contracts between the Farmers bank on the one side and the Penn bank and Reading bank on the other." (R. 71.)

With these findings and conclusions of the Court below, as stated in its opinion, it becomes necessary to examine the bills of complaint further, to determine upon just what averments these statements and conclusions are predicated. Such an examination will show the following vague inferences and legal conclusions. For instance, in Paragraph 19 of the bill (R. 8, 40) it is stated that the Comptroller of the Currency proposed a plan of reorganization which contemplated a sale and division of the proceeds *"which division was arbitrary."* Similarly in Paragraph 22 (R. 9, 41) it is stated that the Comptroller of the Currency acted *"beyond the powers conferred upon him under the National Bank Act or other statutory law,"* which conduct *"was an unlawful assumption of judicial powers neither delegated to him by statute nor capable of being delegated,"* which conduct violated the rights of the bank, its depositors, creditors and stockholders *"and deprived them of their property without due process of law."* In Paragraph 25 (R. 9, 42) it is stated that the Comptroller and Conservator cancelled the alleged claims of the Penn National and Reading National *"in fraud of the rights"* of the banks and depositors, creditors and stockolders. Also, in Paragraph 26 (R. 10, 42) it is stated that the Comptroller in valuing the assets excluded the claims of the banks against the Farmers National, and thus committed *"a grave error of law based*

upon his unwarranted assumption of judicial power in abrogating, canceling and waiving" said claims, "whereby the assessments became invalid and illegal." These are the only averments that approach an attempt to plead such fraudulent or arbitrary conduct as can be made the basis for a direct attack on the Comptroller's decisions.

What constitutes averments of fraud sufficient to justify relief if proven, is thoroughly discussed in Meeker vs. Baxter, 83 Fed. (2) 183-186 (C. C. A. 2):

> "It has indeed been said that it may be impeached for 'fraud' or 'illegality'; and while it is not very clear just what these words mean, we may assume arguendo that if the Comptroller were consciously to assess shareholders in sums which he did not believe to be true, they could show it and escape; perhaps the same may be true if he proceeded in the face of a statute. But his assessment cannot be attacked by showing that the debts were in fact smaller or the assets larger than he took them to be, or that the directors had misconducted themselves or acted without the knowledge of the shareholders, or defrauded them. Fraud must at least mean fraud of the Comptroller in making the assessment, and the defense does not so allege. Nor was a forced subscription from the directors a liquidation. The second and third defenses were as bad; the second amounted to no more than *that the Comptroller did not take all the bank's property into his computation.* It was not enough to add that the assessment was "made in bad faith and is fraudulent, illegal and void"; such charges must be explicit. *If the defendants really meant to say that the Comptroller omitted the mortgage from his computation of the assets, knowing that the transfer was fraudulent and that the property should have been included, they were obliged to say so in detail.* Chamberlain Machine Works vs. United States 270 U. S. 347, 46 S. Ct. 225, 70 L. Ed. 619. They would probably not dare to make such a charge; if they have the hardihood to do so, it must be with circumstance and upon their own oaths, so that they may be accountable for what they say. The third defense comes to no more than that there were no creditors of

> the bank; it has not a semblance of validity as a defense. Thus as a bill for discovery the counterclaims were invalid on their face, because the defenses to which they were ancillary were demurrable." (Italics ours.)

In other words general charges of improper conduct by an officer are insufficient unless they refer to transactions in their nature wrongful or fraudulent. As was said in *Wannamaker vs. Edisto National Bank,* 62 Fed. (2) 696 (CCA 4), at page 699:

> "In addition to specific allegations of fact, the bill of complaint abounds in charges of a fraudulent scheme and design on the part of the Edisto Bank, in general terms, but they are mere conclusions of the pleader, and no facts are stated from which fraud or conspiracy can be legitimately inferred. General charges of this sort are not sufficient, unless the transactions to which they refer are such as in their essential nature to constitute a fraud."

A motion to dismiss does not admit conclusions of law and of fact and other matters not properly pleaded. See:

Chamberlain Machine Works vs. United States, 270 U. S. 347;
Fogg vs. Blair, 139 U. S. 118;
Amick vs. The Mortgage Corp., 30 Fed. (2) 359.

Petitioner concedes that if the Comptroller had acted arbitrarily or fraudulently in the performance of his duties in finding insolvency of these banks and the necessity for an assessment, the stockholders might attack such action by a bill in equity brought against the Receiver for that purpose. But it is not even stated in the bills that the Comptroller was not fully acquainted with the affairs of the bank at the time he appointed the Conservator and the Receivers, and made his findings and order for assessment. It is our contention that no such arbitrary action is shown (fraud is not urged in the bills nor found by the court below) and

that the averments contained in the bills of complaint would not support conclusions and findings to that effect.

There have been instances prior to these cases where the stockholders have attempted in similar proceedings to enjoin the Comptroller from levying the assessment, illustrative of which are the following:

In *Washington National Bank of Tacoma vs. Eckels*, 57 Fed. 870 an attempt was made by a bill in equity to restrain the Comptroller from appointing a Receiver for a bank in liquidation, but the Court held that the decisions of the Comptroller as to the insolvency of the bank, based upon his investigation of the facts, were to be taken as final.

In *Liberty Bank vs. McIntosh*, 16 Fed. (2) 906 (CCA 4) an attempt was made by a bill in equity to enjoin the collection by the Receiver of a failed bank of a stock assessment. The bill averred that the bank had gone into voluntary liquidation and that the indebtedness found by the Comptroller as a basis for the assessment was incorrect. The Court held that the decisions of the Comptroller relating to the liquidation of national banks were not subject to an attack of this kind.

In *Wannamaker vs. Edisto National Bank*, 62 Fed. (2) 696 (CCA 4), a suit was brought in equity by certain stockholders against the Receiver of the bank to enjoin the enforcement of stock assessment liability. The Court refused to permit the injunction, holding that all the averments of the bill with reference to the conduct of the Comptroller in making his decision as to insolvency and the necessity for the assessment were merely conclusions and were not sufficient basis for the injunction.

A very recent case in this connection is that of *United States Savings Bank vs. Morgenthau*, 85 Fed. (2) 811 (App. D. C.), cer. denied 299 U. S. 605. In that case suits were brought against the Secretary of the Treasury and the Comptroller to vacate the receivership of the United States Savings Bank, Washington, D. C. The United States Court of Appeals for the District of Columbia said, page 814:

"In the present case the Comptroller determined that the Bank was insolvent and appointed a receiver as aforesaid under the statute to wind up its affairs. *The question of solvency or insolvency of the Bank depends upon the estimate of appraisal of the value of its securities.* This is a matter of judgment and discretion."

"*It is plain that the difference between the respective parties regarding the solvency or insolvency of the Bank rests upon an estimate of the value of the securities held and properly owned by the Bank during this period.* The Comptroller determined that the Bank was yet insolvent, whereas the president of the Bank contends that it had regained its solvency. This mere contradiction, standing alone, compels the court to accept the official determination of the Comptroller. It has been held by a long array of authorities that, where the Comptroller of the Currency has held a bank to be insolvent and has appointed a receiver for it, the court will not substitute its judgment for the judgment of the Comptroller, unless it appears by convincing proof that the Comptroller's action is plainly arbitrary, and made in bad faith."

"*In the present case no facts are averred which tend to show that the action of the Comptroller was arbitrary, or made in bad faith. The controversy related simply to the estimate entertained by the Comptroller concerning the value of the securities belonging to the Bank. The presumption of correctness attending such a determination cannot be overcome by the mere assertion that it was 'arbitrary, wanton, and malicious.' It is true that the motion sustained by the lower court for a dismissal of the plaintiffs' bill concedes the truth of all facts which are properly pleaded in the bill itself. But in this case no facts are pleaded except a difference in appraisal of the assets of the Bank made by the respective parties,* and these are not sufficient to overcome the presumption which the law attaches to the official determination reported by the Comptroller of the Currency in the exercise of his official duties."

Cases to the same effect are:

Davis Trust Company vs. Hardee, 85 Fed. (2) 571 (App. D. C.);

Acker vs. Hamilton, 85 Fed. (2) 574 (App. D. C.);
United States National Bank of LaGrande vs. Pole, 2 Fed. Sup. 153;
Wilson vs. Awalt, 2 Fed. Supp. 465.

It is our contention that the entire theory advanced by the averments of the bills of complaint, when given their greatest weight, constitute admissions of ownership of the stock, of a finding of insolvency and the existence of the assessment after an official determination by the Comptroller of its necessity to pay the banks' debts; and that after pleading many facts why the Comptroller of the Currency and his subordinates should have followed a different course in administering the affairs of the banks, and should have pursued the alleged causes of action of the Penn National and Reading National against the Farmers National before calling on the stockholders, respondents arrive at the conclusion that if this had been done there would have been no necessity for the assessment. Thus, the bills of complaint resolve themselves into a mere collateral attack, in the guise of a direct attack, upon the official action of the Comptroller in finding that the banks were insolvent and in appointing a Conservator and Receivers and in levying the assessment against the stockholders, which attack is not permitted.

II

The Comptroller Was Not Bound by the Attempted "Merger" of the Three Banks Because

(A) No legal consolidation resulted from the contract of February 17, 1933.

In its opinion the Court below said (R. 68):

> *"The crux of this case centers in the right of the Comptroller to abrogate and set aside the contract in accordance with which the Penn and Reading Banks conveyed their assets to the Farmers Bank,* in consideration for which the Farmers Bank agreed to pay the obligations of the other two banks." (Italics ours.)

It becomes important, therefore, to determine whether the Comptroller had a legal right to disregard the contract of attempted merger, and to direct the Conservator to restore the assets to the Penn National and Reading National after the transfer to the Farmers National, and to place those banks in conservatorship, and receivership, and as a part of their liquidation, subsequently to levy the assessments. It should be noted that it is nowhere averred that the re-allocation of the assets among the three banks was wrongful or unfair or resulted in an unfair advantage of one bank over another, but merely that the Conservator "*arbitrarily re-constructed the assets and liabilities of each of said banks as of April 24, 1933, made an arbitrary division thereof among each of said banks, etc.*" (R. 8, 41—Par. 20); nor is the claim anywhere made that one bank took possession of assets in an amount greater or less than that to which it was entitled, or that any depreciation in value of the assets resulted; nor was it averred that the assets of one bank were allocated to another.

The bills of complaint aver (R. 4, 36—Par. 6) and the agreement itself shows (R. 13, 46) that the banks alone were parties to the contract of February 17, 1933, and that neither the Comptroller nor any subordinate or agent of his, were parties signatory or otherwise to that contract, nor is it anywhere averred that said contract was entered into by the banks with his direction, knowledge or consent. It is solely upon this contract that the opinion of the Court below is based.

The National Bank Act (U. S. C. Sec. 33, Title 12) (App. 44), sets forth the method whereby two or more national banking associations may consolidate. The mandatory requirements for a completed, legal and valid consolidation are:

1. An agreement upon terms of consolidation by a majority of the Board of Directors of each association proposing to consolidate.

2. Ratification of such terms of consolidation by the affirmative votes of two-thirds of the stockholders of each association.

3. Publication of stockholders' meeting.

4. Sending notice to each shareholder by mail.

5. Approval of the Comptroller of the Currency.

Unless these steps outlined by the statute as necessary for a consolidation are taken, and unless the statutory requirements are met including the approval of the Comptroller, no legal consolidation results. See:

Casey v. *Galli*, 94 U. S. 673.
Keyser v. *Hitz*, 133 U. S. 138.
McCormick v. *Market National Bank*, 165 U. S. 538.
Hightower v. *American National Bank*, 263 U. S. 351.
Ex parte Worcester County National Bank, 279 U. S. 347.
Benedict v. *Anderson* (C. C. A. 6), 70 Fed. (2d) 227.
Hiatt v. *Peddy* (C. C. A. 5), 73 Fed. (2d) 235.
Houston v. *Drake*, 18 Fed. Sup. 693.
Warren v. *Boston National Bank*, 252 Mass. 523.

The bills of complaint do not disclose, and counsel for respondents have not contended, that these mandatory requirements of the statute were met. Obviously the bills of complaint are defective and properly subject to a motion to dismiss, if on their face they fail to show a legal consolidation.

It follows that if a legal consolidation was not accomplished, the Comptroller had the right to restore the respective banks to their original status in so far as possible, which was done as of April 24, 1933. After Conservators had been appointed, it was no longer possible for the banks, as corporations, to take any action to accomplish legal consolidation, because conservatorship had placed them under the jurisdiction of the Comptroller. See:

Oppenheimer v. *Harriman National Bank*, 85 Fed. (2d) 582 (C. C. A. 2); 301 U. S. 206.

Hardee v. *Washington Loan & Trust Co.* (App. D. C.), 91 Fed. (2d) 314.
Ross v. *Long* (Ia. 1934), 258 N. W. 94.
In re Hobbs estate (Pa. 1935), 180 A. 140.

It then devolved upon the Comptroller, as the officer charged by law with the administration and supervision of these banks, to take the necessary steps, through the conservators, to restore the banks to their former status by declaring that the attempted consolidation had failed of completion, and to return the assets of the respective banks to their conservators to be held in their behalf for further administration.

The whole structure of the bills of complaint, and the opinion of the Court below are founded upon the major factor of a completed and legal consolidation of these banks. The grievances of the stockholders outlined in the bills of complaint, and the criticisms contained in the opinion of the Court below are predicated upon a valid consolidation or a binding agreement to consolidate. Remove the foundation and the superstructure must fall, and the bills of complaint as a whole must be subject to dismissal.

(B) A "Consolidation" and a "Merger" Are Not the Same; and the Mere Commingling of the Assets of the Three Banks Did Not Create a Legal Consolidation.

A *"merger"* and a *"consolidation"* are often confused, but legally they are not the same, the chief difference being that a consolidation works a dissolution of the corporations consolidating, while a merger does not.

> "That generally the effect of consolidation, as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result."
>
> *Railroad Company* v. *Georgia*, 98 U. S. 359-363.

"The results of a merger are entirely different from those of a consolidation. Ordinarily, when corporations of two or more states 'consolidate' in the technical sense of the term, the old corporations are dissolved and a new corporation comes into being in each state * * *. However, when two corporations unite by way of merger, the result is not the same as in case of consolidation. In the case of merger the one is absorbed by the other, and when we come to apply the true test as to whether, under a given statement of facts, there has been a merger, it becomes necessary to ascertain whether the existence of one of the corporations, as such, has been preserved, and the other has ceased to exist."

Lee v. *Atlantic Coast Line*, 150 Fed. 775-787.

See also:

Walsey v. *Chicago, etc. R. R. Co.*, 147 Fed. 608.
Royal Palm Soap Co. v. *Seaboard Air Line* (C. C. A., Fla.), 296 Fed. 448.
Central University v. *Walters*, 122 Ky. 65, 90 S. W. 1066.
Vicksburg Tel. Co. v. *Citizen Tel. Co.*, 79 Miss. 341, 30 So. 725.
Ramsey v. *Hicks*, 44 Ind. 490; 87 N. E. 1091.
State v. *At. Coast Line R. R.*, 202 Ala. 558, 81 So. 60.
Collins N. Bk. v. *Essau*, 74 Okl. 45, 176 Pac. 514.
Indemnity Co. v. *R. R. Commissioner*, 187 Wis. 528, 205 N. W. 492.

While undoubtedly a legal consolidation of these banks in the manner prescribed by the statute, and consented to by the Comptroller, would have bound him in administering these banks, nevertheless a mere intermingling of their assets by two or more national banks would not affect a consolidation which the Comptroller could not ignore and set aside.

In *Fuller* v. *City National Bank of Huron*, 52 Fed. (2d) 865, affirmed 52 Fed. (2d) 870 (C. C. A. 8), there was involved a sale of the assets of the City National to the First

National, and the resulting transactions were identical with those under consideration here.

> "The physical assets of the City National were moved to the banking house of the First National, and its assets and liabilities entered upon the books of the said First National." Pg. 871.

A Receiver was appointed for the City National and

> "there was a finding by the Comptroller of the Currency that said bank was insolvent." Pg. 872.
>
> "The Comptroller of the Currency *never consented to the consolidation of the City National and the First National banks, and the statutory requirements for consolidation of national banks* have never been complied with." Pg. 872.

The trial Court found that the assets of the two banks were wrongfully intermingled, but that such inter-mingling did not create a consolidation, and said at page 867:

> "It constituted a wrongful scrambling of the assets of the two corporations without authority and without relieving the stockholders of either corporation of their respective liabilities as such * * *."

The Court of Appeals for the Eighth Circuit affirmed the decree of the trial Court in this regard.

Many cases can be cited where, on basically the same facts as those herein involved, viz.: a transfer of assets from one bank to another, an assumption of liabilities, an intermingling of the assets, and a subsequent levying of an assessment against stockholders of the transferring bank by the Comptroller, the assessment was upheld.

Wyman v. *Wallace*, 201 U. S. 230.
Hightower v. *American National Bank*, 263 U. S. 351.
Brown v. *O'Keefe*, 300 U. S. 598.
Washington National Bank v. *Eckels*, 57 Fed. 870.
Liberty Bank v. *McIntosh* (C. C. A. 4), 16 Fed. (2d) 906.

American National Bank v. *Commercial National Bank*, 276 Fed. 371; 254 Fed. 249; 248 Fed. 187 (C. C. A. 5).
King v. *Pomeroy*, 121 Fed. 287 (C. C. A. 8).
George v. *Wallace*, 135 Fed. 286 (C. C. A. 8).
Harris v. *Briggs*, 264 Fed. 726 (C. C. A. 8).
Chase v. *Hall*, 30 Fed. (2d) 195 (C. C. A. 9).
Derschied v. *Andrew*, 34 Fed. (2d) 884 (C. C. A. 8).
Crawford v. *Gamble*, 57 Fed. (2d) 15 (C. C. A. 6).
Wannamaker v. *Edisto Bank*, 62 Fed. (2d) 696 (C. C. A. 4).
Richter v. *Laredo National Bank*, 62 Fed. (2d) 289 (C. C. A. 5).
Erhard v. *Boone State Bank*, 65 Fed. (2d) 48 (C. C. A. 8).
B. V. Emery Co. v. *Wilkinson*, 72 Fed. (2d) 10 (C. C. A. 10).
Hays v. *Wilkinson*, 72 Fed. (2d) 201 (C. C. A. 10).
Stevens v. *Hamilton*, 81 Fed. (2d) 324 (C. C. A. 7).
O'Connor v. *Watson*, 81 Fed. (2d) 833 (C. C. A. 5) Cer. den. 298 U. S. 657.
Trustees of Somerset Academy v. *Picher*, 90 Fed. (2d) 741 (C. C. A. 1).
U. S. National Bank v. *Pole*, 2 Fed. Sup. 153.
Houston v. *Drake*, 18 Fed. Sup. 693.
Wegman v. *Hulse*, 27 Fed. (2d) 187 (D. C. N. Y.).
Holland Banking Co. v. *Continental National Bank*, 43 Fed. (2d) 640 (D. C. Mo.).

In these cases the mere transferring of assets from one bank to another under a contract calling for an assumption of liabilities, the commingling of assets resulting therefrom, and the cessation of business by the transferring bank, did not estop or prohibit the Comptroller from levying and collecting a stock assessment from the stockholders of the transferring bank.

(C) The Contract Was Executory and the Steps Outlined Therein to Make It An Executed Contract Were Not Completed; but Even if a "Merger" Had Resulted, Still the Comptroller Could Levy Assessments on the Stockholders of the Penn National and the Reading National, if He Found it Necessary, and Could Collect Such Assessment Through His Receivers.

The contract (R. 11, 44) *shows on its face that it was at most executory.* The three banks *agreed to merge* and committees of each bank were to be appointed to act with certain accountants to evaluate the assets, which evaluation was to be submitted to the Board of Directors of each bank for approval. Further, the accountants were to submit a plan based on said valuation, and appropriate legal action "to effect a recapitalization" of each bank was to be taken. The stockholders of each bank were to receive a proportionate share of stock of the Farmers National, but liability for assessment was specifically reserved; and finally, all was made subject to approval by the Comptroller and other Governmental authorities.

Nowhere in the bills of complaint is it averred that any of these things was done. It is not shown that the approval of the Comptroller was ever received, or that the plan was worked out or followed, as provided by the agreement of February 17, 1933.

So that in any event the Comptroller did not *"abrogate or set aside"* any contract rights of the contracting parties, as assumed by the Court below. He merely acted on the situation as he found it (no executed contract) and determined the rights of the respective banks in so far as the contract had been executed, and returned the assets to their respective representatives.

But even though a completed "merger" had been effected, with the Penn National and the Reading National going into liquidation, nevertheless the Comptroller could have levied the assessments as he did, and through his Re-

ceivers could have enforced them. The mere liquidation of a bank, and the consent of the Comptroller to it, have no effect on his right to levy and enforce the assessment liability of stockholders, if he officially finds that action to be necessary to pay the debts of the liquidating bank.

Washington National Bank v. *Eckels, supra.*
Liberty National Bank v. *McIntosh, supra.*
Wegman v. Hulse, supra.
Stevens v. *Hamilton, supra.*
O'Connor v. *Watson, supra.*
Trustees of Somerset Academy v. *Picher, supra.*

(D) The Mere Contracting by the Farmers National to Assume the Liabilities of the Penn National and Reading National Did Not Relieve the Last Mentioned Banks from Their Obligations Unless and Until the Farmers National Actually Performed by Payment of the Liabilities Assumed.

The fallacy of the position taken by the respondents and by the Court below seems to lie in their failure to recognize two things:

(1) The mere agreement of the Farmers National to assume the liabilities of the Penn National and Reading National did not relieve the last mentioned banks of their obligations until the Farmers National paid the deposit and other liabilities assumed under the contract, or unless the depositors of the Penn National and Reading National accepted the Farmers National as their new debtor, with a new consideration therefor flowing to them. The bills of complaint aver no facts upon which a novation could be predicated, or which would indicate that the depositors had relieved the Penn National and Reading National of their obligations. The contracts themselves specifically reserved assessment liability of stockholders of the two transferring banks for the benefit of creditors ((R. 13, 45).

Whatever contracts the officers and directors of the banks might make looking to a merger of the banks could not af-

fect the existing right of the creditors to have their debts paid by the Penn National and Reading National, with which banks they originally contracted, and they could not be required to recognize or accept the Farmers National as their debtor without their consent express or implied. Hence the claims of the creditors of those banks, until actually paid, were valid and subsisting, and the mere agreement of the Farmers National to assume the liabilities of the Penn National and Reading National did not strip the last mentioned banks of their liabilities to creditors nor did the denuding of the transferring banks of their physical assets compel the creditors to accept rights of action under the contract against the Farmers National.

The cases and texts fix the general law regarding the necessary elements of a novation which are (1) a previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the extinguishment of the old contract; (4) the validity of the new contract. See:

In re Straub, 158 Fed. 375.
In re Ransford, 194 Fed. 658.
Case Threshing Machine Co. v. *Road District*, 210 Fed. 366.
In re Schwab, 258 Fed. 772.
Dickinson v. *Speedway Co.*, 294 Fed. 693.

There can be no question as to the existence of element (1) and element (4) can be admitted for purposes of argument; but elements (2) and (3) are wholly lacking. Nowhere are any facts averred indicating that the depositors and creditors of the Penn National and Reading National intended to discharge those banks from their debts and to accept the Farmers National as their debtor, or that all the claims were filed against the Farmers National and none against the Penn National and Reading National. All that is shown is that the Farmers National "*carried on and conducted its regular banking business*" (R. 3, 39, Par. 14).

Courts will take judicial notice of published reports of the Comptroller of the Currency, Federal Reserve Bulle-

tins, and other official publications dealing with banks and banking, and this Court has so held in *Texas and Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245-254. It is of assistance in this connection to note from the 74th Annual Report of the Comptroller of the Currency to Congress (1936), pages 360 to 363, inclusive, that claims in large amounts have been filed against all three banks, showing conclusively that the creditors did not release the Penn National and Reading National, or accept the Farmers National as their debtor; and to note further that on those claims the banks have paid only 55 per cent in the case of the Farmers National, 40 per cent in the case of the Penn National, and 25 per cent in the case of the Reading National, which shows conclusively that the full amount of the assessments levied is necessary to pay creditors the amounts of their claims. Even though the creditors of the Penn National and Reading National had filed claims against the Farmers National, that would not estop them from still filing claims against the first mentioned banks also (*City National Bank of Huron* v. *Fuller, supra*); since any estoppel against them could operate only as to any deposits they made in the Farmers National between February 17 and March 6, 1933, which facts are not set up in the bills of complaint. *Thompson* v. *Park Savings Bank*, 77 Fed. (2) 955 (App. D. C.) cer. denied, 296 U. S. 592.

The burden was on respondents to aver and prove facts sufficient to constitute a novation, since it will not be presumed.

> "There is no question here as to the previous valid obligation or the validity of the new. The doubtful question is whether plaintiff intended to discharge the City National from its debt and accept the First National as its debtor. It is a settled proposition that novation is not presumed, and that the burden is on the party alleging and relying thereon to clearly prove it. Intention of the parties is the controlling element." *City National Bank of Huron* v. *Fuller*, 52 Fed. (2) 870 at pg. 874.

The mere assumption of a debt by a third party is not sufficient to constitute a novation, and the creditor may elect to assent, or to ignore the contract and enforce all his rights against the original debtor.

City National Bank of Huron v. *Fuller, supra.*
Steinfeld & Co. v. *Wing Wong,* 14 Ariz. 336, 128 P. 354.
Leckie v. *Bennett, et al.,* 160 Mo. App. 145, 141 S. W. 706;
Copeland v. *Beard,* 217 Ala. 216, 115 So. 389.

(2) The real consideration contemplated by the merger contract was not the mere assumption of the liabilities of the Penn National and Reading National by the Farmers National, but rather was the *assumption and payment* of such liabilities. The contract specifically reserved rights of action against the stockholders. In the absence of novation and until the Farmers National had performed its part of the contract by paying the claims of the creditors of the Penn National and Reading National, and had discharged those liabilities, the Farmers National could not maintain an action against either the Penn National or the Reading National on the supplemental contract of guaranty or on any liability that might be created between the banks. See:

Treadwell v. *Fagan,* 68 Fed. (2) 550, (C. C. A. 5)
Aberly v. *Craven County,* 70 Fed. (2) 52, (C. C. A. 4)

To assume a debt carries with it the undertaking of the performance of the obligations, and where a simple debt is involved the assumption carries with it an agreement to pay. See cases cited 5 C. J. 1375, note 5a.

It is our contention that the theory and construction of the contract and of the rights and liabilities of the parties, as adopted by the trial Court, entirely ignores the principles of assumption and novation.

III.

The Sale of Assets by the Conservator to the Newly Organized National Bank, and the Distribution of the Proceeds of Such Sale, Was Valid and Proper.

Averments are made in the bills of complaint (R. 8, 40—Pars. 19 and 20) that the Comptroller of the Currency proposed a plan of reorganization for these three banks which contemplated the organization of a new national bank and a sale of assets to it, and a division of the proceeds of the sale among the creditors of the respective banks. It is further stated therein that this division was arbitrary inasmuch as it was based on a classification adopted from the report of national bank examiners and not on the basis of the financial condition of the banks as of February 17, 1933, the date of execution of the contract. It is not stated, however, that the basis adopted was wrong or improper, or that the bank examiner's reports incorrectly reflected the assets of the bank, or that the division made resulted in a loss or unfair gain to any of the three banks, or that the assets of one bank were allocated to another, or that the Comptroller was not advised as to the banks' conditions at the time the plan of reorganization, and the disposition of the proceeds of the sale were made. Nor is it anywhere shown that the stockholders have suffered from or have been prejudiced by the method used by the Comptroller.

This procedure is not unusual and the plan under which the sale was made has been resorted to by the Comptroller for many years for the purpose of relieving similar situations. Several hundred banks have been rehabilitated in this way. Further, the Courts have approved such sales. For instance, in *Gockstetter* v. *Williams,* 9 Fed. (2) 354 (C. C. A. 9), a sale by the Receiver of all the assets of the bank was held to be valid and it would logically follow that a sale of a portion of the assets would likewise be valid if made for a proper purpose. In the case of *City National*

Bank v. *Fuller,* 52 Fed. (2) 870 (C. C. A. 8), the Court approved a similar sale and said at page 873:

> "It has become something of a custom for national banks to take over other banks in failing circumstances and this has received the approval of the Comptroller of the Currency. If the transaction is a fair one it is in the public interest. . . . We desire to make clear our position that the transaction between the banks was, in our judgment, a legal one."

In the case of *Barbour* v. *Thomas,* 7 Fed. Sup. 271, 86 Fed. (2) 510 (C. C. A. 6) cert. den. 300 U. S. 670, the stockholders attacked a sale made by the First National Bank—Detroit, and the Guardian National Bank of Commerce to the newly organized National Bank of Detroit involving assets aggregating approximately $150,000,000.00. The Court upheld the sale and decided that the stockholders could not challenge the wisdom of the sale in a suit to enforce the assessment.

In *Davis Trust Company* v. *Hardee,* 85 Fed. (2) 571, (App. D. C.) stockholders of the Federal-American National Bank and Trust Company brought a suit against the Receiver of the bank seeking to enjoin the collection of an assessment levied against them by the Comptroller of the Currency. Among the grounds set forth as a basis for relief from assessment liability was that a sale of the bank's assets made by the Conservator to the newly organized Hamilton National Bank, at the direction of the Comptroller, was unfair to stockholders because the sale did not take into consideration the possibility of a future enhancement in the value of the assets. The trial Court declined to enjoin the collection of the assessment and the Court of Appeals affirmed that decision.

It should be noted that the bills of complaint do not aver that full value was not received for the assets or that the sale was fraudulent. They merely state that the division of the proceeds of the sale among the three banks was arbi-

trary and on a basis not now satisfactory to the stockholders.

We respectfully urge upon this point that the sale made by the Conservators was proper and should not be permitted to be attacked by such evasive and general language as is contained in the bills of complaint.

IV.

Respondents Are Guilty of Laches.

The respondents complain of the fact that the Comptroller proposed a plan of reorganization of these three banks which involved a sale of their assets by the Conservators of the bank to a newly organized national bank. They also complain about the division of the proceeds of the sale among the three banks, and of the fact that the Conservator, acting under instructions from the Comptroller, reallocated the assets among the banks without attributing proper value to the claims of the Penn National and Reading National against the Farmers National, and thus abrogated the effect of the agreement of February 17, 1933.

All of these things are said to have been done in October, 1933. If the stockholders objected to the sale of assets by the Conservator, and the re-allocation of the assets among the banks, they should have made their objections known and demanded that action be taken for their protection, and should not have awaited the levying of the assessments before taking action in February 1935 when these suits were filed.

In the case of *Bailey* v. *Tillinghast*, 99 Fed. 801 (C. C. A. 6), stockholders sought to avoid payment of the assessment by setting up illegalities and fraudulent practices in the organization and management of the bank. In discussing this defense the Court said at page 808:

> "It is not meant to say that irregularities may not occur so gross as to authorize the stockholder to intervene, and apply to the proper tribunals for correction;

> but in that case the proceeding must be promptly taken, and not delayed until the rights of others have become involved in business entered upon with the presumption that the ground is clear, or that, if irregularities have occurred, they have been condoned."

In *Benedict* v. *Anderson,* 70 Fed. (2d) 227 (C. C. A. 6) the stockholders attempted to avoid payment of their assessment on the ground that the stock was obtained as a result of the declaration of a stock dividend. The Court refused to allow this defense, stating on page 229:

> "He never undertook in an action against the bank or the comptroller to rescind the issuance to him of any of the dividend stock. The court found upon substantial evidence that the bank publicly advertised in the newspapers and other publications, on bill-boards, in the street cars, and upon its windows and in the financial statements placed upon its counters, that its stock was increased as above indicated."

In the case of *Barbour* v. *Thomas,* 86 Fed. (2d) 510 (C. C. A. 6) cer. den. 300 U. S. 670, the sale by the Conservators of the Detroit banks was attacked by the stockholders as a ground for avoiding payment of the assessment. The District Court in its opinion (7 Fed. Sup. 271) said at page 276:

> "Neither does the Court concede that the stockholders can stand by until the Conservator, with the approval of the Court, sells a part of the assets, and then challenge the wisdom of the sale in a suit to enforce the statutory liability."

And commenting in that case upon the defense that the Federal and state officials had wasted the assets, the Circuit Court of Appeals said on page 516:

> "The Congress probably did not foresee the cataclysmic conditions existing in and around Detroit in the early part of 1929, but we see no logic in, nor necessity for, abrogating the statute simply because the cir-

cumstances were unusual. On the other hand, it seems to us that the more unparalleled the situation, the greater the need for depositors' protection. If assets of the bank were being wasted by the alleged illegal action of state and federal officials it occurs to us that the directors of the holding company, instead of acquiescing, would have resorted to the courts to stop it."

In *Davis Trust Company* v. *Hardee,* 85 Fed. (2) 571 (App. D. C.) the stockholders of the Federal-American National Bank and Trust Company attempted to enjoin collection of the assessment on the grounds that the sale of assets by the Conservator was unfair to the stockholders and creditors because the sale did not take into consideration possible future enhancement in value of assets. The Court refused to consider this as a defense to payment of the assessment.

An analogous situation has arisen where a creditor of a failed national bank has filed a general claim against it and then, at some future time when the situation is entirely changed, attempts to promote such general claim to a preferred claim. In the case of *Poole* v. *Elliott,* 76 Fed. (2) 772, (C. C. A. 4) the Court said at page 775:

"In such cases, therefore, the establishment of a trust in favor of depositors on the ground of hopeless and irretrievable insolvency would affect a large part of the obligations to depositors and probably all of the cash assets passing into the hands of the receivers; and the court should not entertain a petition asking such relief unless petitioner has acted promptly on learning of the bank's insolvency and before matters have progressed to the point that relief cannot be afforded without injustice to other persons interested in the administration of the estate. Such a case is peculiarly one for the application of the maxim, "vigilantibus non dormientibus aequitas subvenit." What delay would constitute laches barring a depositor from the right to insist on such relief under different circumstances we need not here decide. Certainly he should not be permitted to amend his petition and ask such relief for the

first time after three years have elapsed and so much has been done towards the liquidation of the estate and the establishment of the rights of the parties interested therein."

See also:

Standard Oil Company v. *Elliott*, 80 Fed. (2d) 158 (C. C. A. 4).
City Bank v. *Blackmore*, 75 Fed. 771 (C. C. A. 6).

An analogous situation arises where, when sued to enforce the assessment the stockholder sets up fraud on the part of the bank's officers in inducing him to purchase his stock. The Courts have uniformly held that such a defense can not be asserted to collection of the assessment and that prompt action must be taken to rescind the transaction. See:

Delano v. *Butler*, 118 U. S. 634.
Lantry v. *Wallace*, 182 U. S. 536.
Scott v. *Deweese*, 181 U. S. 202.
Williams v. *Stone*, 25 Fed. (2d) 831 (C. C. A. 4).
B. V. Emery & Co. v. *Wilkinson*, 72 Fed. (2d) 10 (C. C. A. 10).
National Bank v. *Newbegin*, 74 Fed. 135 (C. C. A. 8).
Scott v. *Lattimer*, 89 Fed. 843 (C. C. A. 8).
Anderson v. *Cronkelton*, 32 Fed. (2d) 170 (C. C. A. 8).
Wilcox v. *Harriman Securities Corp.*, 10 Fed. Sup. 532.

The stockholders must be taken to have known of the proposed plan of reorganization, the sale of assets to the new bank, the re-allocation of the assets among the three banks and the appointment of a Conservator and Receivers for them. Since they did not act promptly to protect whatever rights they had, such objections come too late when they are asserted by the stockholders for the sole purpose of avoiding payment of the assessment, and years after the transactions complained of, when the circumstances are vastly different, and liquidation has progressed so far to establish and vest the rights of creditors in the insolvent estates.

V.

Speedy Action is Necessary in Collecting the Assessment in Order that the Rights of Creditors May Be Protected.

As has been stated, the gist of the bills of complaint is that if certain alleged claims of the Penn National and Reading National against the Farmers National, in the respective amounts of $5,100,000.00 and $9,000,000.00, are pursued, the enforcement of the assessment against the stockholders of these banks would be unnecessary. We take the position that the Comptroller has the right under the law to collect the full amount of the assessment immediately, and if, after liquidating the assets, causes of action and claims of the bank, it should appear that the assessment was unnecessary in whole or in part, then the law affords ample protection to the stockholders.

The National Bank Act (Section 197, Title 12 U. S. C.) (App. 46) provides in effect that when every creditor of a failed national bank shall have been paid in full, together with expenses of the receivership, a meeting of the stockholders will be called at which shall be determined whether the receivership shall be continued or whether an agent shall be elected to liquidate the interests of the stockholders. An elaborate system is provided for protecting the stockholders' interests and the return to them of any money that they may have paid on their stock assessment which may be found to be unnecessary for use in paying the debts of the bank, is by law amply secured. The Courts have repeatedly held that as between the stockholders and the creditors the convenience of the latter is preferred. Thus, in *Kennedy v. Gibson*, 8 Wall. 498 at pages 505-506, this Court said:

> "It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise, in the intervening time. The

amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases can not be foreseen. The same remarks apply to the enforced collections from the stockholders. *A speedy adjustment* is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain after satisfying all demands against the association, shall be paid over to the stockholders. *It is better they should pay more than may prove to be needed than that the evils of delay should be encountered.*" (Italics ours.)

And again in *Studebaker* v. *Perry,* 184 U. S. 258, at page 262 this Court said:

"In many instances, the value of the bank's assets might make it altogether probable that but a small portion of the shareholders' contribution would be needed. To require payment in full of money which might be held for years while the bank's affairs were being wound up, and then be returned without interest, would certainly be a hardship upon the shareholders. If, to avoid that hardship, the Comptroller should postpone the assessment until he could fully inform himself of the condition of the bank's affairs, in the time that might thus elapse, some of the stockholders might become insolvent or remove their property from the reach of legal proceedings, and thus a loss be thrown upon the creditors.

"There is nothing in the language of the sections involved to compel us to adopt a view of the law which would result in such manifest inconveniences."

And the decisions emphasize the fact that the stockholder must pay promptly when he is called upon, since the statutory liability was created for the protection of creditors and in order to strengthen banks in the confidence of the public.

See:

Richmond v. *Irons*, 121 U. S. 27.
Christopher v. *Norvell*, 201 U. S. 216.
Korbly v. *Springfield Inst. for Sav.*, 245 U. S. 330.
Liberty Bank v. *McIntosh*, 16 Fed. (2d) 906 (C. C. A. 4).
Crawford v. *Gamble*, 57 Fed. (2d) 15 (C. C. A. 6).
Sneeden v. *City of Marion*, 64 Fed. (2d) 721; 291 U. S. 262.
Heiden v. *Creimin*, 66 Fed. (2d) 943 (C. C. A. 8).
Broderick v. *American General Corp.*, 71 Fed. (2d) 864 (C. C. A. 4).
U. S. Savings Bank v. *Morgenthau*, 85 Fed. (2d) 811 (App. D. C.).

The United States Circuit Court of Appeals for the Third Circuit recognized the fact that positive and quick action was contemplated in winding up insolvent national banks and said in *Miller* v. *Stock, supra*:

> "We are admonished by the Supreme Court that it is the duty of Federal Courts to act promptly in aiding the Comptroller in enforcing the liability of shareholders, that Court saying in Kennedy v. Gibson et al., 8 Wall. 498, 505, 19 L. Ed. 476: 'A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it.' And in Korbly v. Springfield Inst. for Savings, 245 U. S. 333, 38 S. Ct. 88, 90, 62 L. Ed. 326, this language is virtually repeated, the statutory provisions being referred to, as intended 'to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions . . .' In pursuance thereof, we act with promptness in disposing of this case and no longer delaying the enforcement of the Comptroller's assessment made September 28 1931."

And the opinion of the Court below (R. 69) recognizes this principle. However, the practical effect of the decision of the Court below is to permit and encourage delay in the

liquidation of these banks merely because the stockholders disagree with the decisions of the Comptroller as to the necessity for the assessment and with the value which he assigned to the assets of the banks available to pay their debts. It is respectfully submitted that the decision of the Court below, if permitted to stand, sets up a precedent for all times that stockholders can question the finding and decisions of the Comptroller as to the existence of insolvency and the necessity for the assessment. If the decision stands, it will be necessary for the petitioner to proceed with the litigation in the District Court, to attempt to evaluate the assets by a lengthy process of accounting and thus attempt to ascertain what the alleged claims of the Penn National and Reading National against the Farmers National arising out of the attempted merger agreement are worth as compared with the assets which were allocated in their places. Such a precedent has never heretofore been sanctioned by this Court.

As stated above, nowhere is it shown that the stockholders were harmed or prejudiced by the course resorted to by the Comptroller in administering the assets of these banks. They should not be permitted to delay the liquidation of these banks and the early distribution of proceeds to depositors and creditors, but on the contrary should be required to respond immediately by paying the assessments.

CONCLUSION.

It is therefore submitted that the action of the [illegible] Court in reversing the orders of the United States District Court, and thus sustaining the right of the stockholders to enjoin the enforcement and collection of the assessment, was error

and the decision below should be reversed and the suits should be ordered dismissed with prejudice.

Respectfully submitted,

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
CHARLES W. MATTEN,
Attorneys for Petitioner.

GEORGE P. BARSE,
Attorney for Comptroller of Currency,
Of Counsel.

APPENDIX.

Section 33. Consolidation of banks; capital stock; dissenting shareholders; notice; valuation of shares.

Any two or more national banking associations located within the same State, county, city, town, or village may, with the approval of the Comptroller of the Currency, consolidate into one association under the charter of either existing banks, on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association proposing to consolidate, and be ratified and confirmed by the affirmative vote of the shareholders of each such association owning at least two-thirds of its capital stock outstanding, at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in some newspaper published in the place where the said association is located, and if no newspaper is published in the place, then in a paper published nearest thereto, and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting: *Provided*, That the capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national bank in the place in which it is located: *And provided further*, That if such consolidation shall be voted for at said meetings by the necessary majorities of the shareholders of each of the associations proposing to consolidate, any shareholder of any of the associations so consolidated, who has voted against such consolidation at the meeting of the association of which he is a shareholder or has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of consolidation, shall be entitled to receive the value of the shares so held by him if and when said consolidation shall be approved by the Comptroller of the Currency, such value to be ascertained as of the date of the Comptroller's approval by an appraisal made by a committee of three persons, one to be selected by the shareholder, one by the directors, and the third by the two so chosen; and in case the value so fixed shall not be satisfactory to the shareholder he may within five days after being notified of the appraisal appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said

reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of the reappraisal; otherwise the appellant shall pay said expenses, and the value so ascertained and determined shall be deemed to be a debt due and be forthwith paid to said shareholder from said bank, and the share so paid shall be surrendered and after due notice sold at public auction within thirty days after the final appraisement provided for in this section.

Publication of notice and notification by registered mail of the meeting provided for in the foregoing paragraph may be waived by unanimous action of the shareholders of the respective associations. Where a dissenting shareholder has given notice as above provided to the association of which he is a shareholder of his dissent from the plan of consolidation, and the directors thereof fail for more than thirty days thereafter to appoint an appraiser of the value of his shares, said shareholder may request the Comptroller of the Currency to appoint such appraiser to act on the appraisal committee for and on behalf of such association.

If shares, when sold at public auction in accordance with this section, realize a price greater than their final appraised value, the excess in such sale price shall be paid to the shareholder. The consolidated association shall be liable for all liabilities of the respective consolidating association. In the event one of the appraisers fails to agree with the others as to the value of said shares, then the valuation of the remaining appraisers shall govern. (Nov. 7, 1918, c. 209, Sec. 1, 40 Stat. 1043; June 16, 1933, c. 89, Sec. 24 (a), 48 Stat. 190; Aug. 23, 1935, c. 614, Sec. 330, 49 Stat. 718.)

Section 197. Shareholders' meeting; continuance of receivership; appointment of agent; winding up business; distribution of assets.

Whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section 192 and other section of this Code, and when, as provided in section 194 thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the

redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall, by the vote of a majority of the stock in value and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided; and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order

and control of said comptroller and said receiver, or either of them; and for this purpose said comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to the said agent the said comptroller and the said receiver shall by virtue of this chapter be discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond.

And in case any such agent so elected shall refuse to serve, or die, resign, or be removed, any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of the said association was carried on, by giving notice thereof for thirty days in a newspaper published in said town, city, or village, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and shall have executed a bond to the shareholders conditioned for the faithful performance of his duties, in the penalty fixed by the shareholders at said meeting, with two sureties, to be approved by a judge of a court of record,

and file said bond in the office of the clerk of a court of record in the county where the business of said association was carried on, he shall have all the rights, powers, and duties of the agent first elected as hereinbefore provided. At any meeting held as hereinbefore provided administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

First. To pay the expenses of the execution of the trust to the date of such payment.

Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said comptroller or said agent. (June 30, 1876, c. 156, Sec. 3, 19 Stat. 63; Aug. 3, 1892, c. 360, 27 Stat. 345; Mar. 2, 1897, c. 354, 29 Stat. 600.)

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Supreme Court of the United States

OCTOBER TERM 1937

No. 123

HARVEY S. ADAMS, RECEIVER, PENN NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA, *Petitioner*,

v.

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY AND WILLIAM M. MAYER.

No. 124

HARVEY S. ADAMS, RECEIVER, READING NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA, *Petitioner*,

v.

J. EDWIN TOBIAS, RALPH S. HILL AND OSCAR P. SMITH.

REPLY BRIEF BY PETITIONERS.

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
CHARLES W. MATTEN,
Attorneys for Petitioner.

GEORGE P. BARSE,
Attorney for Comptroller of Currency,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF BY PETITIONERS.

Respondents urge in their brief (pages 30-34) that there was no authority in the Comptroller of the Currency to set aside the agreements of February 17, 1933 and February 20, 1933.

Petitioners submit that the Comptroller had ample authority to take that action. Paragraph 5 of the agreement of February 17, 1933 (Record 13) provided that the transfer of assets by the Penn National Bank and the Reading National Bank was:

> "Conditioned upon the assumption by Farmers National Bank and Trust Company of Reading of all the deposit liabilities of the companies as well as other liabilities thereof. * * *".

Obviously this included the implied requirement that the Farmers Bank would not only assume these obligations but pay them. The condition was not met and the Farmers National Bank in legal effect committed an anticipatory breach by either becoming, or being, in a condition whereby it was incapacited from performing the obligation. It carried on business for thirteen days after February 17th, was closed by the banking holiday proclamation, was not reopened for business, and according to the allegations to the bill of complaint (Record 6-7, paragraph 15) it was found that the Farmers National Bank

> "was unable to transact and carry on its ordinary banking business, or to exercise its usual banking functions without prejudicing the rights of depositors and other creditors * * *,"

and that it was necessary in consequence thereof to place it in conservatorship. It remained in conservatorship and was placed in receivership on November 8, 1934 (Paragraph 23 bill of complaint, Record 9).

The law is settled that where one party to an executory contract either files voluntary bankruptcy or is placed in involuntary bankruptcy, such action is tantamount to anticipatory breach and entitles the other party to the contract to rescind. *Kamps and Sacksteder Drug Co.* v. *United Drug Co.*, 160 N. W. 271, 272; 164 Wis. 412; *Central Trust*

Co. v. *Chicago Auditorium Association*, 240 U. S. 581, 589, 591, 592; *Johnston* v. *Grimm*, 229 N. W. 716-719; *United Press Association* v. *National Newspaper Association*, 237 Fed. 547, 553. Receivership of the Farmers Bank was analogous to bankruptcy.

It seems clear that had the Penn National and the Reading National Banks not been placed in receivership, they would have had full authority, in view of the inability of the Farmers National Bank to reopen and carry out its contract, and its subsequent conservatorship,—to treat such action on the part of the Farmers National Bank as an anticipatory breach as well as a complete failure of consideration, and to rescind the contract and be restored to statu quo by the recovery of their assets, under the plainest principles of equity.

The receiver, under Section 5234, Revised Statutes (Sec. 192 U. S. C., Title 12; quoted pages 8 and 9 of respondents' brief) took over all assets and rights of action which these banks possessed, for administration under the supervision and direction of the Comptroller, and it was held in *Kennedy* v. *Gibson*, 8 Wall. 498, 506, that the receiver becomes a statutory assignee of the national bank when it is placed in receivership, and that he takes over all of its assets and choses in action. From this it follows that the conservator, (who had the rights of a Receiver, Davis Trust Co. v. Hardee, 85 F. (2) 571), and the Comptroller had the right under the existing circumstances to rescind the agreement of February 17, 1933, and restore the Penn and Reading Banks to their former status, taking into consideration the changes in accounts and assets that had occurred in the interim. The bill of complaint (Paragraph 19, Record 8) shows that this readjustment was based upon an examination and report of the national bank examiners of April 24, 1933.

Attention is also directed to a national bank receivership case decided December 2, 1937, by the United States Circuit Court of Appeals for the Seventh Circuit (not yet

reported), being No. 6215 of that court and entitled *Ella Pickett* v. *Louis G. Trixler, Receiver of Howard National Bank of Kokomo, et al.*

Respectfully submitted,

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
CHARLES W. MATTEN,
Attorneys for Petitioner.

GEORGE P. BARSE,
Attorney for Comptroller of Currency,
Of Counsel.

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IN THE

Supreme Court of the United States

No. 123. October Term, 1937.

HARVEY S. ADAMS, Receiver, Penn National Bank and Trust Company of Reading, Pennsylvania,

Petitioner,

v.

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY and WILLIAM M. MAYER,

Respondents.

No. 124. October Term, 1937.

HARVEY S. ADAMS, Receiver, Reading National Bank and Trust Company of Reading, Pennsylvania,

Petitioner,

v.

J. EDWIN TOBIAS, RALPH S. HILL and OSCAR P. SMITH,

Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief of Respondents in Opposition.

EDWARD W. MADEIRA,
GEORGE EVES,
JOHN B. STEVENS,
HARRY W. LEE,
EDWARD D. TREXLER,
W. BRADLEY WARD,
LEMUEL B. SCHOFIELD,
Counsel for Respondents.

International, 236 Chestnut St., Philadelphia

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IN THE

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Petitioner,

v.

J. EDWIN TOBIAS, RALPH S. HILL AND OSCAR P. SMITH,
Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION

NON-JOINDER OF APPELLEES.

The appellees in the consolidated cases in the Court below were the Comptroller of the Currency and the respective receivers of each bank. (R. 1.) The decrees of

the Circuit Court of Appeals (R. 96, 97) reversed the orders of the District Court of June 25, 1935 (R. 35, 75) dismissing the bills as to both defendants in each suit, appellees in the court below, and denying the preliminary injunctions. All the appellees joined in the petition for rehearing which was denied. (R. 113.)

The petition for writs of certiorari was filed by the respective receivers of each bank, appellees in the court below. The Comptroller of the Currency, appellee in each case in the court below, did not join as a party to the petition. The record fails to show service of summons and severance upon the Comptroller of the Currency as such appellee in each suit.

It is submitted that the petition therefore should be denied on the authority of *Boynton v. Hutchinson Gas Co.*, 292 U. S. 601, and cases cited.

OPINIONS BELOW.

The opinions of the District Court (R. 27, 33, 71, 74) are not reported. The opinion of the Circuit Court of Appeals (R. 88) is reported in 88 Fed. (2d) 936. The dissenting opinion (R. 94) is reported in 88 Fed. (2d) 940.

JURISDICTION.

The decrees of the Circuit Court of Appeals were entered March 10, 1937 (R. 96, 97). The petition for rehearing was denied April 19, 1937 (R. 113). The petition for writs of certiorari was filed June 8, 1937. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Is an assessment by the Comptroller of the Currency upon stockholders of a national bank to enforce their statutory liability, subject to a direct attack by a suit in equity for an injunction on the grounds that, under the facts alleged in the bills of complaint and admitted by the motions to dismiss, the determination of the Comptroller was beyond his statutory powers and was arbitrary and capricious?

The Court below answered this question in the affirmative.

STATEMENT.

The facts material for the consideration of the question presented, as alleged in the bills of complaint and admitted by the motions to dismiss, are concisely stated in the opinion of the Circuit Court of Appeals (R. 88-94).

The Statement of Facts in the petition for writs of certiorari, however, contains several inaccuracies, which also pervade the Specification of Errors, the Questions Presented and the Reasons for Granting the Writs of Certiorari, and which respondents deem it necessary to correct.

(a) The petition in its Statement of Facts (p. 6) states: "It was further averred that on January 15, 1935, the Comptroller . . . made an assessment . . . 'upon a proper accounting by the Receiver' and 'upon a valuation of the uncollected assets remaining in his hands' (R. 12, 56)." The reference is to paragraphs 24 of the bills, which allege that on January 15, 1935, the Comptroller made an assessment "wherein he *recited* that upon a proper accounting by the Receiver . . . and upon a valuation of the uncollected assets remaining in his hands",

it was necessary to make the assessment. The bills simply alleged the fact of the assessment and its recitals. The petitioner misconstrues this allegation and mistakenly regards it as an affirmative pleading of the matters recited in the Comptroller's assessment. Such is not the case.

(b) The petition in its Statement of Fact (p. 6) states that the bills of complaint allege "that in arriving at the valuation of the assets and determining insolvency these claims against the Farmers National were disregarded (R. 13, 57)." The reference is to paragraphs 26 of the bills which allege: "The alleged valuation of the remaining assets . . . upon an alleged proper accounting . . . *excluded* as an asset the said claim . . . ."

(c) The petition in its Statement of Facts (p. 6), in purporting to sum up the allegations of the bills, states that "the only contention advanced" is that "the Comptroller failed to give proper value to certain alleged claims of the Penn National and Reading National against the Farmers National which claims, had they been properly evaluated, would have made the assessment unnecessary". There is no foundation for this statement, either in the allegations as they appear in the bills, or as they are misconstrued by the petitioner as pointed out above.

The contention of the respondents, as set forth in detail in the bills of complaint, is not that the Comptroller erred in the exercise of his judgment in the valuation of assets, but that the assessment itself was beyond his statutory powers and was arbitrary and capricious.

ARGUMENT.

For a proper understanding of the petition in connection with the Specifications of Errors, the Questions Presented, and the Reasons for Granting the Writs of Certiorari, as set out therein, it is necessary that the several grounds of the decision of the Court below be stated definitely. The respondents, therefore, submit that the following propositions were decided by the Court below:

First: The statutory liability of stockholders of a national bank is a conditional liability in the sense that it can be enforced only after all the ordinary resources of the bank have been exhausted and that the Comptroller has the power to determine the necessity and amount of the assessments. (R. 91.) This proposition is not challenged in the petition.

Second: The determination of the Comptroller as to the necessity and amount of the assessment is ordinarily conclusive and may not be judicially reviewed (R. 91), nor may it be collaterally attacked. (R. 93.) This proposition is not challenged in the petition.

Third: An assessment upon stockholders by the Comptroller is subject to a direct attack by a suit in equity for an injunction on the ground that it was beyond the statutory powers of the Comptroller and was arbitrary and capricious. (R. 93.) It is difficult to understand from the petition whether this proposition is or is not conceded. Accordingly it will be regarded by the respondents as challenged.

Fourth: The abrogation of the contract of February 17, 1933 and all rights thereunder, and the refusal to en-

force the claims of the two banks, were beyond the statutory powers of the Comptroller and were arbitrary and capricious. (R. 92, 93.) This proposition is challenged in the petition and the construction of the contract of February 17, 1933 by the Court below is alleged as error.

This argument will be confined to the consideration of the third and fourth propositions as set forth above.

I.

An Assessment of Stockholders by the Comptroller Is Subject to a Direct Attack by an Injunction Suit on the Ground That It Was Beyond the Statutory Powers of the Comptroller and Was Arbitrary and Capricious.

The general rule, settled by an unbroken line of authorities beginning with *Kennedy v. Gibson,* 8 Wall. 498, 505, is that the determination of the Comptroller as to the necessity and amount of the assessment is conclusive in an action by the receiver to enforce the statutory liability of stockholders of a national bank.

But a qualification of this general rule, as important as the rule itself, is that the acts of an administrative official may be directly attacked for fraud or errors of law. This was implicit in *Kennedy v. Gibson,* supra, under the doctrine of the supremacy of law over actions of administrative officials. In accordance with that doctrine, it is firmly established that the wrongful action of an administrative official, even though the head of a government department, may be restrained. *Noble v. Union River Logging R. R.,* 147 U. S. 165 (1893); *American School of Magnetic Healing v. McAnnulty,* 187 U. S. 94 (1902); *Philadel-*

phia Co. v. Stimson, 223 U. S. 605 (1912); *Waite v. Macy,* 246 U. S. 606 (1918).

The doctrine as it relates to the power of the Comptroller with respect to an assessment, received its first judicial expression in *United States v. Knox,* 102 U. S. 422-425, a case in which the opinion was written by Mr. Justice Swayne, who also wrote the opinion in *Kennedy v. Gibson.* In *United States v. Knox,* the Court said (p. 425):

> "In the process to be pursued to fix the amount of the separate liability of each of the shareholders it is necessary to ascertain, 1, the whole amount of the par value of all the stock held by all the stockholders; 2, the amount of the deficit to be paid after exhausting all the assets of the bank; 3, then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value."

After thus defining the power of the Comptroller in making an assessment, the Court went on to state (p. 425):

> "Although assessments made by the Comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably contrary to the views we have expressed, it cannot be doubted that a Court of equity, if its aid were invoked, would promptly restrain him by injunction."

Thus the resultant rule is that the determination of the Comptroller as to the necessity and amount of the assessment, while conclusive in an action by the receiver to en-

force the statutory liability of stockholders, is subject, like other administrative orders, to a direct attack in equity for fraud or errors of law.

In many cases where a receiver has sued to enforce the stockholder's liability and the stockholder has attempted to attack the assessment collaterally, the courts, while refusing to permit the collateral attack, have recognized the right of a stockholder to make a direct attack upon an assessment in a suit in equity for an injunction. *Deweese v. Smith*, 106 Fed. 438, 445 (C. C. A. 8, 1901), affirmed 187 U. S. 637 (1902); *B. V. Emery Co. v. Wilkinson*, 72 Fed. (2d) 10, 12 (C. C. A. 10, 1934); *Crawford v. Gamble*, 57 Fed. (2d) 15, 17 (C. C. A. 6, 1932); *Wilson v. Awalt*, 2 Fed. Supp. 465, 467 (D. C., M. D. Pa. 1933); *Liberty National Bank v. McIntosh*, 16 Fed. (2d) 906, 909 (C. C. A. 4, 1927).

In *Korbly v. Springfield Savings Institution*, 245 U. S. 330, there was a direct attack and the enforcement of an assessment by the Comptroller was restrained as beyond his powers.

The ground for a direct attack on an administrative order in the last analysis is error of law as distinguished from error of fact. Under errors of law may be subsumed administrative acts which are beyond the statutory powers of the official or which are arbitrary and capricious. *Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 276; *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 72.

The Court below, in the instant case, in reversing the orders of the District Court, expressly based its decision on the ground that the assessment was beyond the statutory powers of the Comptroller and was arbitrary and capricious. (R. 90, 91, 92, 93, 94.)

The first reason set forth in the petition for granting the writs of certiorari (p. 8, 9) is that the lower Court decided an important question of Federal law in a manner in conflict with applicable decisions of this Court and in conflict with decisions of the Circuit Court of Appeals, including the Third Circuit, "upon the question of the right of shareholders in national banking associations to inquire into the correctness of the official determinations and findings of the Comptroller of the Currency as to insolvency and the necessity for an assessment."

No such question is raised by the allegations of the bills, nor did the Court below rest its decision on any such basis. Furthermore, the petition does not specify any error of the Court below in that respect.

The petition states (p. 10): "The effect of the decision in this case is to permit an inquiry by the stockholders as to the correctness of the Comptroller's decision and official determination of insolvency and the necessity for an assessment . . . ." But the effect of the decision is not to permit an inquiry into the correctness of an assessment, but is, on the contrary, to annul and set aside altogether an assessment which is beyond the statutory powers of the Comptroller and which is arbitrary and capricious.

The petition, like the dissenting opinion, apparently relies on the proposition that the recitals contained in the assessment of the Comptroller are conclusive. It is conceded that this is so in a case where the assessment is within the statutory authority of the Comptroller, but the rule does not apply where, as in the instant case, he exceeds his authority and acts in an arbitrary and capricious manner.

This Court in *Morgan v. United States*, 298 U. S. 468, 477, in speaking of an order of the Secretary of Agriculture under the Packers and Stockyards Act, said (p. 477):

> ". . . When the Secretary acts within the authority conferred by the statute, his findings of fact are conclusive . . . But in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion . . . "

The contention that the decision of the Court below is in conflict with applicable decisions of this Court, and in conflict with decisions of the Circuit Court of Appeals, including the Third Circuit, is not sound. That contention is the result, first, of a failure to recognize that an assessment by the Comptroller is subject to a direct attack on the ground that the assessment was beyond his statutory powers and was arbitrary and capricious, and, second, in assuming that the effect of the allegations of the bills and the decision of the Court below, is to permit an inquiry into the correctness of the Comptroller's determination. It is clear that the allegations of the bills and the decision of the Court below are based upon the ground that the assessment by the Comptroller was beyond his statutory authority and was arbitrary and capricious.

This failure of the petition to recognize the right of stockholders to make a direct attack upon an assessment by the Comptroller has led counsel to cite as authorities allegedly in conflict with the decision of the lower Court, cases in which stockholders attempted to defend actions by receivers to enforce the statutory liability. In such cases the determination of the Comptroller is conclusive and is not subject to collateral attack. Apart from those cases, which have no application, counsel has failed to point out

any holding in any case which can be regarded as in conflict with the decision of the lower Court.

II.

The Court Below Was Not in Error in Holding That the Comptroller Had No Power to Set Aside and Abrogate the Executed Agreement of Transfer of Assets and Assumption of Liabilities.

The second reason advanced in the petition involves the interpretation of the contract of February 17, 1933 (Exhibit A, R. 15, 60). The contention of the petition on this point is not clear, but it would appear to be that the transfer of assets by the Penn Bank and Reading Bank to the Farmers Bank, and the assumption of the liabilities by the latter, came within the provisions of the National Bank Act as to consolidation of national banks, that such transfer of assets did not comply with the statutory requirements as to consolidation, that therefore the Comptroller had the power to set aside and abrogate the transfer, and that consequently the Court below erred in holding that the Comptroller had no power so to do. The petition mistakenly regards the decision of the Court below as holding "in effect" that the contract "created a merger or consolidation of the banks which the Comptroller could not set aside" (Specification of Error No. 5, P. 7). But the Court below did not so hold. The Court properly disregarded entirely that part of the contract of February 17, 1933, which related to the merger and which was immaterial to the issue.

The contract consisted of two agreements: first, an agreement of the Penn Bank, Reading Bank and Farmers Bank to merge under the name of Farmers Bank, and sec-

ond, the agreement of Penn Bank and Reading Bank with Farmers Bank to transfer and assign all the assets of Penn and Reading Banks to Farmers Bank conditioned upon the assumption by Farmers Bank of all their liabilities.

The first agreement contemplated a merger or consolidation under statutory provisions (*12 U. S. C. Section 33*). This agreement was never completed. The second agreement was a present transfer of the assets of Penn Bank and Reading Bank, both on the verge of insolvency, by resolution of their boards of directors conditioned upon the assumption of their liabilities by Farmers Bank. This agreement was within the powers of a national bank under the statutory provisions which confer on a national bank the power to exercise by its board of directors "all such incidental powers as shall be necessary to carry on the business of banking" (*12 U. S. C. Section 24, seventh*). This agreement was fully completed and executed. The assets were transferred and the liabilities assumed.

The petition fails to recognize that one contract may contain two agreements, either dependent upon or independent of each other. The first agreement to merge or consolidate was dependent upon the performance of the second agreement to transfer the assets, but the second agreement was in no wise dependent upon the completion of the first agreement to consolidate. The lower Court therefore was not in error in ignoring the first agreement to merge or consolidate. It had no bearing whatsoever upon the rights of the parties, which had already accrued under the second agreement, in conformity with which the assets had been transferred and the liabilities assumed.

It has been repeatedly held that a transfer of assets, in consideration of the assumption of liabilities, of a na-

tional bank on the verge of insolvency, to another national bank by virtue of resolutions of the boards of directors, is legal and not ultra vires of either bank. *City National Bank of Huron v. Fuller,* 52 Fed. (2d) 870 (C. C. A. 8, 1931); *B. V. Emery & Co. v. Wilkinson,* 72 Fed. (2d) 10, (C. C. A. 10, 1934); *Hays v. Wilkinson,* 72 Fed. (2d) 201; (C. C. A. 10, 1934); *Richter v. Laredo National Bank,* 62 Fed. (2d) 289, (C. C. A. 5, 1932); *Aberly v. Craven County,* 70 Fed. (2d) 52, (C. C. A. 4, 1934); *Wannamaker. v. Edisto National Bank,* 62 Fed. (2d) 696, (C. C. A. 4, 1933).

The executed agreement to transfer the assets was consistent with the policy and provisions, express or implied, of the National Bank Act, and was therefore subject to state laws. *Jennings v. U. S. F. & G. Co.,* 294 U. S. 216, 219. Under the law of Pennsylvania where one transfers all his property to another who agrees to pay all the debts of the transferror, not only the transferror but all creditors of the transferror have a direct claim against the transferee as beneficiaries of the contract. *Mitchell, Receiver of Liberty Clay Products Co.,* 291 Pa. 282, and cases cited.

Such an agreement of transfer of assets and assumption of liabilities did not require the approval of the Comptroller of the Currency to give it legal effect. As a matter of fact, however, it was alleged in the bills (Pars. 9; R. 6, 51) and not denied, that the transfer of assets and assumption of liabilities was "with the knowledge, approval, and acquiescence of the Comptroller of the Currency". It was also alleged in the bills and admitted by the motions, that the supplemental contract of February 20, 1933 (Exhibits B, R. 18-19; 63-64) executed by the banks to supplement the contract of February 17, 1933, was en-

tered into "at the direction of the Comptroller of the Currency". (Pars. 7; R. 6, 50). It was also alleged and admitted that thereafter the Comptroller administered the transferred assets. (Pars. 16; R. 9, 53.)

The Comptroller had no power to set aside the executed agreements of transfer. As the Court below said (R. 90), "Congress did not give him such power. No principle of law, which, in our opinion, authorizes the Comptroller to do this has been cited by counsel or the Court below."

The contention of the petition that the Comptroller had the right to set aside the executed transfer of assets because there was no legal consolidation is therefore without merit, and the Court below made no error in ignoring the question of the agreement of merger or consolidation of the three banks.

Conclusion.

The third, fourth and fifth reasons advanced in the petition are not separately discussed by respondents because they contain, in somewhat modified form, the same contentions which are set forth in the first reason and which have been fully answered.

The decision below is correct. There is no conflict with decisions of this Court or with Circuit Courts of Appeals, including the Third Circuit. The case presents no unsettled principle of general importance, but turns largely on its own facts.

Regardless of the merits of the reasons assigned in the petition for granting the writs of certiorari, the non-joinder

of the Comptroller of the Currency, appellee in each case in the Court below, is sufficient to defeat the petition.

The petition for writs of certiorari should be denied.

Respectfully submitted,

EDWARD W. MADEIRA,
GEORGE EVES,
JOHN B. STEVENS,
HARRY W. LEE,
EDWARD D. TREXLER,
W. BRADLEY WARD,
LEMUEL B. SCHOFIELD,
Counsel for Respondents.

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IN THE

Supreme Court of the United States

No. 123. October Term, 1937.

HARVEY S. ADAMS, Receiver, PENN NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA,

Petitioner,

v.

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY and WILLIAM M. MAYER.

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J. EDWIN TOBIAS, RALPH S. HILL and OSCAR P. SMITH.

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Brief for Respondents.

EDWARD W. MADEIRA,
GEORGE EVANS,
JOHN B. STEVENS,
HARRY W. LEE,
EDWARD D. TRINKLE,
W. BRADLEY WARD,
LEMUEL B. SCHOFIELD,
Attorneys for Respondents.

International, 326 Chestnut St., Philadelphia

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IN THE

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The opinions of the United States District Court for the Eastern District of Pennsylvania (R. 20-22, 24-25, 53,

55) are not reported. The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 66-72) is reported in 88 Fed. (2) 936. The dissenting opinion (R. 72-74) is reported in 88 Fed. (2) 940.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the judicial code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Is the power of the Comptroller of the Currency to make an assessment on stockholders of a national bank subject to the basic or quasi-jurisdictional fact that the ordinary resources of the bank have been exhausted?

2. Is an assessment made by the comptroller where the ordinary resources of the bank have not been exhausted because of the unlawful abrogation of a valid claim sufficient to pay all debts, subject to a direct attack by a suit in equity on the grounds that, upon the facts alleged in the bills of complaint and admitted by the motions to dismiss, the assessment was beyond the comptroller's statutory power, violated the requirements of due process, and was arbitrary and capricious?

STATEMENT OF FACTS.

The material facts set forth in the bills of complaint as amended, which on the motions to dismiss are deemed admitted, are as follows.

Prior to February 17, 1933, there were three national banks in the City of Reading, Pennsylvania: the Penn National Bank and Trust Company of Reading, the Reading

National Bank and Trust Company, and the Farmers National Bank and Trust Company of Reading.

On February 17, 1933, the Penn National Bank and the Reading National Bank were subjected to unsual withdrawals of deposits which depleted their reserves and placed both banks on the verge of insolvency. (R. 5, 37.) Because of these conditions the two banks entered into an agreement with the Farmers National Bank on February 17, 1933, whereby, in contemplation of a consolidation with Farmers National Bank, it was agreed that all the assets of the Penn National Bank and the Reading National Bank should be transferred forthwith to the Farmers National Bank, conditioned upon the immediate assumption by the Farmers National Bank of all the deposit liabilities, as well as all other liabilities, of the Penn National Bank and the Reading National Bank, excepting liabilities to stockholders as such. (R. 5, 6, 37, 38.) The contract was executed by all parties (Exhibit A, R. 11-13; Exhibit A, R. 44-46).

A supplemental contract was entered into by the parties on February 20, 1933, at the suggestion and direction of the Comptroller of the Currency. In this supplemental contract, the Penn National Bank and the Reading National Bank guaranteed to the Farmers National Bank that their respective assets would in value exceed the deposit liability and other liabilities assumed by the Farmers National Bank (R. 4-5, 37, Exhibit B 13-14; Exhibit B 46-47).

The terms of the agreement of February 17, 1933, relating to the transfer of assets were duly carried out and the Penn National Bank and the Reading National Bank transferred to the Farmers National Bank all their assets and surrendered complete control and possession of their business to the Farmers National Bank. In accordance with the provisions of the agreement, the Farmers National Bank

appointed executive officers to conduct its business at the former places of business of the Penn National Bank and the Reading National Bank, which were designated as branches of the Farmers National Bank and from that time on the Penn National Bank and the Reading National Bank ceased to exercise any control or dominion over their former assets and ceased to transact any business whatsoever. All of this was done with the knowledge, approval and acquiescence of the Comptroller of the Currency (R. 5, 38).

At the time of the execution of the agreement of February 17, 1933, and the transfer of the assets, the assets of both the Penn National Bank and the Reading National Bank had a value in excess of the liabilities assumed by the Farmers National Bank (R. 5-6, 38), and the claims of the two banks against the Farmers National Bank were and still are more than sufficient in the ordinary course of liquidation to pay and discharge all their liabilities without the necessity of an assessment on the stockholders (R. 22-24, 53-54).

The Farmers National Bank continued to do business with its combined and commingled assets from February 17 until March 18, 1933, when the acting Comptroller of the Currency appointed a conservator for the Farmers National Bank. The conservator took possession of all the assets, including the assets which had been acquired from the Penn National Bank and the Reading National Bank, and began his administration thereof (R. 7, 39-40).

Eight months later, on or about October 10, 1933, the Comptroller of the Currency, without notice of any kind to either the Penn National Bank, the Reading National Bank, or any of their depositors, creditors, or stockholders, and without a hearing of any kind, and without warrant or authority of law or a decree or order of any court, made

a ruling to the effect that the agreements of February 17 and February 20, 1933, were without legal effect, and directed that the transfer and delivery of the assets and the assumption of the liabilities which had been effected under these contracts should be disregarded, and attempted to allocate among the three banks the assets transferred and delivered theretofore to the Farmers National Bank (R. 7, 40). At the same time the comptroller appointed a conservator for the Penn National Bank and one for the Reading National Bank, choosing to designate the same individual for each of the three institutions (R. 7-8, 40) in spite of the adverse interests of each against the other (R. 8, 41).

A so-called plan of reorganization of the three banks was then proposed by the comptroller, which provided for the creation of a new national bank. Pursuant to this plan the conservator arbitrarily reconstructed the assets and liabilities of each of the three banks as of April 24, 1933 and made an arbitrary division thereof among them. A loan was obtained from the Reconstruction Finance Corporation by a pledge of certain of the assets. Other assets were sold. The new national bank established on its books lump sum credits for the benefit of the conservator of each of the three banks in amounts sufficient to permit a distribution to the creditors of each of the three banks in the following percentages of the claims against each; Farmers National Bank, 35 per cent.; Penn National Bank, 25 per cent.; Reading National Bank, 25 per cent. (R. 8, 22-24, 40-41, 53-54).

Pursuant to the instructions of the comptroller and in accordance with his ruling abrogating the agreements of February 17 and 20, 1933, and all rights and obligations thereunder, the conservator ignored and disregarded the claim of the Penn National Bank against the Farmers Na-

tional Bank in the amount of approximately $5,100,000 and ignored and disregarded the claim of the Reading National Bank against the Farmers National Bank in the amount of approximately $9,000,000 and made no attempt to compel the Farmers National Bank to discharge its obligation to either the Penn National Bank or the Reading National Bank (R. 8-9, 41).

A year later, after completion of the so-called plan of reorganization, the comptroller appointed receivers for each of the three banks who failed, neglected and refused to collect the claims of the Penn National Bank and the Reading National Bank against the Farmers National Bank, which were the only and ordinary resources of the two banks for the payment of their creditors and by reason thereof failed to comply with the conditions and provisions of the National Bank Act upon which stockholders of a national bank may be assessed (R. 9-10, 42).

On January 15, 1935, after reciting that upon a proper accounting by the receivers and upon a valuation of the uncollected assets it appeared necessary to assess the stockholders, he made an assessment upon the shareholders of the Penn National Bank and the Reading National Bank, demanding the payment of 100 per cent. of the par value of their stock (R. 9, Exhibit C, 14-15; R. 42, Exhibit C, 47-48). The alleged valuation made by the comptroller upon the alleged proper accounting, on which the assessments were made excluded as an asset of the Penn National Bank its claim against the Farmers National Bank of approximately $5,100,000 and excluded as an asset of the Reading National Bank its claim against the Farmers National Bank of approximately $9,000,000 (R. 10, 42-43).

SUMMARY OF ARGUMENT.

I. The Statutory Liability of Stockholders of a National Bank Is Conditional Upon the Exhaustion of the Ordinary Assets of the Bank.

II. The Power of the Comptroller to Make a Determination as to the Necessity and Amount of an Assessment Is Subject to the Basic or Quasi-Jurisdictional Fact that the Ordinary Resources of the Bank Have Been Exhausted.

III. An Order of Assessment by the Comptroller Is Subject to a Direct Attack in Equity on the Grounds That It Was Beyond His Statutory Power, Violated the Requirements of Due Process, or Was Arbitrary and Capricious.

IV. The Bills of Complaint Set Forth a Cause for Equitable Relief by Specifically Alleging Facts Which Show That the Assessment by the Comptroller Was Beyond His Authority, Violated the Requirements of Due Process, and Was Arbitrary and Capricious.

(a) The Only Assets of the Penn National Bank and the Reading National Bank Are Their Claims Against the Farmers National Bank.

(b) The Claims Are Sufficient to Pay All the Debts of the Two Banks Without the Necessity of an Assessment on Stockholders.

(c) The Comptroller Refused to Enforce the Claims.

(d) The Comptroller Without Authority Abrogated the Claims.

V. The Contention that Respondents Are Guilty of Laches Was Not Considered by the Circuit Court of Appeals, Was Not Mentioned in the Petition for Writ of Certiorari or in the Specifications of Error, and Is Without Merit.

ARGUMENT.

I.

The Statutory Liability of Stockholders of a National Bank Is Conditional Upon the Exhaustion of the Ordinary Assets of the Bank.

The statutory liability of stockholders of a national bank upon the voluntary or involuntary liquidation of the bank is set forth in 12 U. S. C. Sec. 64 (Act of December 23, 1913, Chap. 6, Sec. 23, 38 Stat. 273; See also 12 U. S. C. Sec. 63, Rev. Stat. Sec. 5151) as follows:

> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock . . . ."

Section 191 of 12 U. S. C. (Act of June 30, 1876, Chap. 156, Sec. 1, 19 Stat. 63) provides that the comptroller whenever he shall become satisfied of the insolvency of a bank after due examination of its affairs, may appoint a receiver "who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in Section 192".

Section 192 of 12 U. S. C. (Rev. Stat. Sec. 5234, as amended by Act of May 15, 1916, Chap. 121, 39 Stat. 121) provides as follows:

> " . . . Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts,

> and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings . . . ."

This is the section which is primarily involved in the present case. It prescribes the duties of the receiver which are to be performed by him under the direction of the comptroller. These duties are: first, to take possession of all books, records and assets of the bank, collect the claims of the bank, upon order of court sell or compound all bad or doubtful debts, and sell real and personal property on such terms as the court shall direct; and, second, "if necessary to pay the debts of such association, enforce the individual liability of the stockholders".

Under the direction of the comptroller the receiver is required by the statute to perform the duties enumerated. Until he does perform his duties of collecting and liquidating the assets of the bank, there is no basis on which to form the conclusion of the necessity to enforce the personal liability of the stockholders. The duties enjoined upon the receiver are specifically and definitely enumerated. Not until after making this enumeration does the statute provide that the receiver may, "if necessary to pay the debts" enforce the individual liability of the stockholders. In other words by the terms of the statute itself, the performance by the receiver of his duties to collect and liquidate the assets of the bank is a condition precedent to the enforcement of the statutory liability of the stockholders. His duty to enforce the individual liability arises only when his other duties have been performed as theretofore enumerated.

Thus the individual liability of a stockholder is a conditional liability. The ordinary resources of the bank must first be exhausted.

Not only does this conclusion result from the phraseology and implications of the statute, but it is confirmed by its history and congressional reports.

The original National Bank Act (Act of February 25, 1863, c. 58, sec. 12, 12 Stat. 665) provided for the individual liability of stockholders but did not prescribe a method for the enforcement of the liability. As explained in the Senate by the chairman of the committee having charge of the bill, this was left for future legislation. (Cong. Globe, 37 Cong. 3rd Session, Part 1, pp. 824-825.)

The original National Bank Act was repealed in its entirety, with certain saving clauses, the following year and the Act of June 3, 1864 (c. 106, 13 Stat. 99) was adopted in its place. This act originated in House Bill No. 395 which was passed by the House and in the Senate was referred to the Committee on Finance which reported the bill with amendments.

Section 12 of the bill provided for the individual liability of stockholders and was enacted without amendment. From that section is derived the present Section 63 of 12 U. S. C. which, so far as the individual liability of stockholders is concerned, is identical with the present Section 64 of 12 U. S. C.

Section 50 of the bill provided for the liquidation of the affairs of the bank by the receiver under the direction of the comptroller. Like the similar section in the Act of 1863, it did not provide a method for the enforcement of the individual stockholders' liability and consequently it was amended for that purpose. From this section, as finally

enacted, is derived the present Section 192 of 12 U. S. C. (Supra, pages 8-9.)

Two amendments were proposed in the Senate. One, offered by Senator Cowan of Pennsylvania, was to insert a clause requiring the receiver to collect "an amount from each shareholder equal to the amount of stock held by such stockholder." The other was offered by Senator Sherman of Ohio, a member of the committee having charge of the bill, and was to insert the following clause after the enumeration of the duties of the receiver: "and may, if necessary to pay the debts of such association, enforce the individual liability provided for by the twelfth section of this Act".

During the debate it was pointed out that the Cowan amendment would require the receiver to enforce the individual liability of the stockholders immediately without regard to the assets of the bank. On the other hand, Senator Sherman explained that his amendment would "enable the receiver at any time whenever it becomes necessary, to enforce the individual liability; and in case it is not necessary, if the other assets are sufficient, he will not enforce this contingent liability, which is intended as an ultimate security of the creditors of the bank."

After full explanation of its purpose and effect the amendment proposed by Senator Sherman of the Committee on Finance, was adopted. (Cong. Globe, 38 Cong. 1st Session, pp. 2203-2204, set forth in full in Appendix to Respondents' Brief, pp. 1a to 9a.)

This Court recognized the conditional nature of the stockholders' liability in BANK v. KENNEDY, 17 Wall. 19, when it said (page 22) (italics ours):

> **". . . Stockholders are not ordinary debtors of the bank, but are rather in the light of creditors, their stock being regarded as a liability. They are entitled**

to all the surplus that remains, if any should remain, after the payment of the debts. *They are only conditionally liable for those debts after all the ordinary resources of the bank have been exhausted,* and they ought not to be prosecuted without due regard to the circumstances of the case . . . ."

II.

The Power of the Comptroller To Make a Determination as to the Necessity and Amount of an Assessment Is Subject to the Basic or Quasi-Jurisdictional Fact That the Ordinary Resources of the Bank Have Been Exhausted.

The statute gives authority to the receiver to enforce the individual liability of the stockholders under the direction of the comptroller. It was early held by this Court in the leading case of KENNEDY v. GIBSON, 8 Wall. 498, that before the receiver can act the comptroller must first determine both the necessity for and the amount of any assessment to be made. As stated in that case (page 505), "this action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver". This has since been the uniform rule.

But, as the statutory liability of stockholders is subject to the condition precedent of the exhaustion of the ordinary assets of the bank, so the determination of the comptroller as to the necessity and amount of the assessment is subject to the same condition precedent.

This was expressly recognized in UNITED STATES v. KNOX, 102 U. S. 422. In that case the comptroller had assessed the stockholders of a national bank a sufficient percentage upon the par value of the stock held by them to discharge the liabilities of the bank, but by reason of the

inability of the receiver to collect from insolvent and foreign stockholders, a deficit still existed. A creditor filed a petition for a writ of mandamus directed to the comptroller to require him to make a further assessment. The petition was denied and on appeal the decision was affirmed. In the course of the opinion written by Mr. Justice Swayne, who also wrote the opinion in KENNEDY v. GIBSON, *supra*, this Court discussed the duties of the comptroller in making an assessment and said (page 425) (italics ours):

> "In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain, 1, the whole amount of the par value of all the stock held by all the shareholders; 2, *the amount of the deficit to be paid after exhausting all the assets of the bank;* 3, then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value . . . ."

It is clear, therefore, that the comptroller must first exhaust all the assets of the bank before he may proceed to ascertain the amount of the deficit to be paid by the stockholders. His determination of the necessity and amount of the assessment is subject to the condition precedent that the assets of the bank have been exhausted. This is a condition which is to be fulfilled by him before his power to make an assessment arises. It is not a matter which is entrusted to his judgment and discretion. It is a basic or quasi-jurisdictional fact conditioning his power. In all cases the absence of the basic or quasi-jurisdictional fact required to support an administrative order renders it void. UNITED STATES v. B. & O. R. Co., 293 U. S. 454, 464; UNITED STATES v. CHICAGO, M., ST. P. & P. R. Co., 294 U. S. 499,

504; BORAX LTD. v. LOS ANGELES, 296 U. S. 10, 18; CROWELL v. BENSON, 285 U. S. 22, 54; FLORIDA v. UNITED STATES, 282 U. S. 194, 215.

Because the statute does not provide for a judicial review of the determination of the comptroller as to the necessity of an assessment, he is not required to make quasi-jurisdictional findings. UNITED STATES v. B. & O. R. Co., *supra*.

It is conceded that there is the presumption that a public officer has properly performed his duties. PHILADELPHIA AND TRENTON R. Co. v. STIMPSON, 14 Peters 448, 458; U. S. v. CHEMICAL FOUNDATION, 272 U. S. 1, 14-15. The presumption is stronger where the administrative order contains a recital of procedure conforming to the statutory requirements. But it is still merely a presumption and operates only until the contrary is shown in appropriate proceedings. The rule does not preclude proof that the conditions precedent to the exercise of the power have in fact not been complied with.

Nor is the recital conclusive. This Court in MORGAN v. UNITED STATES, 298 U. S. 468, in speaking of the recitals in an administrative order of the Secretary of Agriculture under the Packers and Stockyards' Act, said (page 477):

> "... in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion ..."

In his dissenting opinion in the present case, Judge Buffington relies upon the recitals in the orders of assessment. He quotes them and then concludes (R. 73): "It

therefore appears the receivers have collected the assets of said banks and on the basis of what has been collected and the valuation of those not collected (which would include the alleged claims of Penn and Reading against Farmers) it was necessary to assess the shareholders 100% . . . ." But the recitals are not conclusive and the bills of complaint in express terms contradict the recitals. They contain the positive allegations that the valuation by the comptroller *excluded* as assets the claims of the Penn National Bank and the Reading National Bank against the Farmers National Bank. (Par. 26, R. 10; Par. 26, R. 42-43.) Those allegations are supported by the detailed averments concerning the origin of the claims and their unlawful abrogation by the comptroller.

Whether or not, in a given case, the receiver has performed his duties and exhausted the ordinary resources of the bank before the comptroller makes an assessment is a pure question of fact, to be decided, as stated in BANK v. KENNEDY, *supra*, "with due regard to the circumstances of the case". After a reasonable performance by the receiver of his duties of collecting and liquidating the ordinary assets of the bank, the comptroller may properly value the remaining assets, and if a deficit exists, determine the necessity and amount of the assessment. It is conceded that the comptroller need not wait until all of the assets of the insolvent bank are literally exhausted before he can determine the necessity of enforcing the individual liability of the stockholders. To compel him thus to wait would unduly delay the winding up of banks and would be impractical.

But the comptroller has no authority completely to disregard all of the assets of the bank, abrogate its valid claims which would discharge its liabilities and obviate the necessity for an assessment, and proceed directly to enforce the

individual liability of the stockholders in complete disregard of the statutory prerequisites. In the words of the majority opinion of the Circuit Court of Appeals (R. 70): "But no case has gone so far as to hold that the Comptroller may entirely disregard the statutory provisions for winding up an insolvent bank and arbitrarily, and in violation of law, enforce the individual liability of stockholders . . . ."

Applying these principles to the instant case, the bills affirmatively show that the comptroller did not exhaust the ordinary resources of the banks and that by attempting to abrogate the claims of the two banks against the Farmers National Bank, which were their only resources for the payment of their debts, he acted arbitrarily and capriciously and in violation of the requirements of due process in making the assessment.

III.

An Order of Assessment by the Comptroller Is Subject to a Direct Attack in Equity on the Grounds That It Was Beyond His Statutory Power, Violated the Requirements of Due Process, or Was Arbitrary and Capricious.

It is recognized by the respondents that the determination of the comptroller as to the necessity and amount of an assessment, insofar as it involves merely the exercise of judgment, is conclusive. A stockholder of a national bank submits himself to the laws of the United States relating to the incorporation and regulation of national banks. Those laws impose upon stockholders the liability for the debts of the bank and the determination by the comptroller as to the necessity and amount of the assessment is an incident of the incorporation.

It has been settled by an unbroken line of authorities beginning with KENNEDY v. GIBSON, 8 Wall. 498, that the

comptroller's determination is conclusive in an action at law to enforce the stockholder's liability and cannot be collaterally attacked. CASEY v. GALLI, 94 U. S. 673; GERMANIA NAT'L BANK v. CASE, 99 U. S. 628; BUSHNELL v. LELAND, 164 U. S. 684; FORREST v. JACK, 294 U. S. 158; DEWEESE v. SMITH, 106 Fed. 438 (C. C. A. 8), aff. SMITH v. BROWN, 187 U. S. 637; MURRAY v. SILL, 7 Fed. (2) 589 (C. C. A. 9); COLLINS v. CALDWELL, 29 Fed. (2) 329 (C. C. A. 5); CHASE v. HALL, 30 Fed. (2) 195 (C. C. A. 9); MILLER v. STOCK, 65 Fed. (2) 773 (C. C. A. 3); B. V. EMERY & Co. v. WILKINSON, 72 Fed. (2) 10 (C. C. A. 10).

The dissenting opinion of Judge Buffington in the present case relied upon MILLER v. STOCK, *supra*. In that case suit was brought by the receiver to recover the amount of the assessment, and the defense was that the assets of the bank were sufficient to pay its debts, that the bank was solvent, and that the comptroller had not sufficient evidence to warrant the appointment of a receiver or to justify the making of the assessment. Judge Buffington wrote the opinion and held that such a defense was not valid in a suit to enforce the stockholders' liability and that the action of the comptroller in making the assessment could not be collaterally attacked. That decision is sound and is in line with the other authorities above cited. But it has no relevancy to the present case which does not involve a collateral attack.

The comptroller's determination is likewise conclusive in proceedings to enjoin the enforcement of the assessment by suits in equity or by equitable defenses interposed in actions at law, *where the grounds are not those upon which equity affords relief against administrative orders.* LIBERTY NATIONAL BANK v. MCINTOSH, 16 Fed. (2) 906 (C. C. A. 4); COLLINS v. CALDWELL, 29 Fed. (2) 329 (C. C. A. 5); CRAW-

FORD v. GAMBLE, 57 Fed. (2) 15 (C. C. A. 6); WANNAMAKER v. EDISTO NATIONAL BANK, 62 Fed. (2) 696 (C. C. A. 4); SCHRAM v. SCHWARTZ, 68 Fed. (2) 699 (C. C. A. 2); MEEKER v. BAXTER, 83 Fed. (2) 183 (C. C. A. 2); SILK v. AKE, 83 Fed. (2) 618 (C. C. A. 6); DAVIS TRUST CO. v. HARDEE, 85 Fed. (2) 571 (C. C. A. D. C.); ACKER v. HAMILTON, 85 Fed. (2) 574 (C. C. A. D. C.); BARBOUR v. THOMAS, 86 Fed. (2) 510 (C. C. A. 6); TRUSTEES OF SOMERSET ACADEMY v. PICHER, 90 Fed. (2) 741 (C. C. A. 1); CHURCH v. HUBBARD, 91 Fed. (2) 406 (C. C. A. 6).

But the determination of the comptroller is not conclusive and his order of assessment is subject to a direct attack in equity where his order was beyond his statutory power, violated the requirements of due process, or was arbitrary and capricious. A bill in equity for an injunction is the recognized mode of procedure by which the wrongful action of an administrative officer, even though he be the head of a government department, may be restrained.

The grounds which have been recognized for such relief are: (a) that the order was beyond the statutory power of the officer, SCHOOL OF MAGNETIC HEALING v. MCANNULTY, 187 U. S. 94; KNIGHT v. LANE, 228 U. S. 6; GARFIELD v. GOLDSBY, 211 U. S. 249; NOBLE v. UNION RIVER LOGGING R. R. Co., 147 U. S. 165; NEW ORLEANS v. PAINE, 147 U. S. 261; (b) that the order impairs vested rights, BALLINGER v. FROST, 216 U. S. 240; NOBLE v. UNION RIVER LOGGING CO., *supra;* GARFIELD v. GOLDSBY, *supra;* and (c) that the order was arbitrary, capricious, and unreasonable, GARFIELD v. GOLDSBY, *supra;* BALLINGER v. FROST, *supra;* LANE v. MICKADIET, 241 U. S. 201; KNIGHT v. LANE, *supra.*

The rule was recognized by this Court as applicable to the Comptroller of the Currency in UNITED STATES v. KNOX, 102 U. S. 422, which case was cited hereinbefore with respect

to the prerequisites to the validity of the order of assessment. (Supra, pages 12-13.) The Court, after setting forth those prerequisites, stated (p. 425):

> "Although assessments made by the Comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction."

In TRUSTEES OF SOMERSET ACADEMY v. PICHER, 90 Fed. (2) 741 (C. C. A. 1), a case relied upon by the petitioners, the bill prayed that the receiver be enjoined from instituting any suits to collect assessments against the stockholders of the bank. The bill was amended to include the prayer "that the comptroller's finding of October 2, 1934, be declared null and void." After hearing the bill was dismissed. The evidence to support the bill was held both by the District Court and by the Circuit Court of Appeals to be irrelevant and immaterial. It related to the validity of a note of the insolvent bank because of which the assessment was made. But the court recognized the rule that an assessment is subject to a direct attack, saying (page 743): "It cannot be maintained that the plaintiff's complaint is a direct attack on the Comptroller's action. To constitute a direct attack upon the judgment of the Comptroller there must be allegations of fraud on his part or a lack of power to act in the premises . . ."

In MERKER v. BAXTER, 83 Fed. (2) 183 (C. C. A. 2), also relied upon by the petitioners, a suit was brought by the receiver against stockholders to enforce the assessment,

The answer denied everything in the complaint and set up three separate defenses pleaded both as such and as counterclaims. The second defense set up was that the bank had been indebted to the Reconstruction Finance Company in the sum of $200,000., that in fraud of its creditors it had conveyed its banking house for $366,000. to another company, that the grantee had then executed a mortgage back to the bank which it in turn assigned to the Reconstruction Finance Company, that the fair valuation of the property had not been taken into account in determining the alleged liability for which the action was brought, and that on this account the assessment was made in bad faith and was fraudulent, illegal and void. The court recognized that an assessment is subject to a direct attack but held the defense insufficient for want of specific allegations, saying (page 186): "... the second [defense] amounted to no more than that the Comptroller did not take all the bank's property into his computation. It was not enough to add that the assessment was 'made in bad faith, and is fraudulent, illegal and void'; such charges must be explicit. If the defendants really meant to say that the Comptroller omitted the mortgage from his computation of the assets, knowing that the transfer was fraudulent and that the property should have been included, they were obliged to say so in detail."

In many of the other cases cited hereinbefore (Supra, pages 17-18) where the determination of the comptroller was held to be conclusive, the courts have recognized the right of a stockholder *on proper grounds* to make a direct attack upon the order of assessment by a suit in equity for an injunction.

In the more recent of these cases the grounds for a direct attack are described as "errors of law, fraud or

mistake", or simply "fraud". These expressions apparently had their origin in the opinion of Judge Walter H. Sanborn in DEWEESE v. SMITH, *supra*, in which it is stated (p. 445):

> " . . . Under the acts of Congress and the decisions of the courts to which reference has been made the comptroller of the currency constitutes a quasi judicial tribunal, to whose exclusive determination Congress has intrusted the decision in the first instance of the questions, what proportion of the full liability of the shareholder of an insolvent bank it is necessary to collect to pay its debts, and when this amount shall be paid. His decisions of questions within his jurisdiction are, like the decisions of the land department and of other quasi judicial tribunals, impervious to collateral attack, and open to avoidance by the court only in a direct attack upon them on the grounds of clear error of law, fraud, or mistake. U. S. v. KNOX, 102 U. S. 422, 425, 26 L. Ed. 216; U. S. v. NORTHERN PAC. R. Co., 95 Fed. 864, 870, 37 C. C. A. 290, 296; BOGAN v. MORTGAGE Co., 63 Fed. 192, 195, 11 C. C. A. 128, 130, 27 U. S. App. 346, 350; U. S. v. WINONA & ST. P. R. Co., 67 Fed. 948, 959, 15 C. C. A. 96, 107, 32 U. S. App. 272, 289 . . . ."

But the expression "errors of law, fraud, or mistake" as the grounds for direct attack upon administrative orders is too broad and indefinite. Mistake or error of judgment on the part of the comptroller cannot be a ground for an attack on an assessment. Fraud is too indefinite a term with too many connotations to be of any help without precise definition. And not every error of law would justify the invalidation of an administrative order.

It is respectfully submitted that the grounds upon which an order of assessment by the comptroller may be directly attacked are those on which any administrative

order may be challenged, viz., that the order was beyond his statutory power, or violated the requirements of due process, or was arbitrary and capricious. The Comptroller of the Currency stands in no different position than any other administrative officer of the government. If his actions are beyond his authority, if he violates the requirements of due process, or acts in an arbitrary and capricious manner, he is subject to the control of courts of law. Equity may restrain him.

IV.

The Bills of Complaint Set Forth a Cause for Equitable Relief by Specifically Alleging Facts Which Show That the Assessment by the Comptroller Was Beyond His Authority, Violated the Requirements of Due Process, and Was Arbitrary and Capricious.

To the bills of complaint the defendants filed motions to dismiss. A motion to dismiss is in the nature of a demurrer and admits all the facts which are well pleaded.

The petitioners complain that the bills contain "vague inferences and legal conclusions". (See Petitioners' Brief, pages 16, 18.) While there are some averments in the bills which partake of the nature of conclusions, such averments are proper for the purpose of showing the true theory underlying the suits and to indicate the aspect on which the proofs are to be interpreted. ALLEN v. O'DONALD, 23 Fed. 573; aff. 141 U. S. 528; 1 STREET, FEDERAL EQUITY PRACTICE, Sec. 175, p. 102; CLARK ON CODE PLEADING, 157.

The bills do not allege mere conclusions. They contain specific allegations of the facts upon which the right of the respondents to equitable relief depends. These averments are precise and definite and may be arranged for convenience under the following headings:

a. The only assets of the Penn National Bank and the Reading National Bank are their claims against the Farmers National Bank.

b. These claims are sufficient to pay all their debts without the necessity of an assessment on stockholders.

c. The comptroller refused to enforce these claims.

d. The comptroller without any authority abrogated the claims.

(a) THE ONLY ASSETS OF THE PENN NATIONAL BANK AND THE READING NATIONAL BANK ARE THEIR CLAIMS AGAINST THE FARMERS NATIONAL BANK.

The bills allege that at the time of the execution of the agreement of February 17, 1933, the Penn National Bank and the Reading National Bank were on the verge of insolvency and, because of such emergency, the agreement was entered into with the Farmers National Bank after authority by resolutions of the boards of directors of the respective banks (Par. 8, R. 5; Par. 8, R. 37). The agreement consisted of two separate contracts: first, a contract of the three banks to merge under the name of Farmers National Bank; and, second, the contract of the Penn National Bank and the Reading National Bank forthwith to transfer and assign all their assets to Farmers National Bank conditioned upon the assumption by Farmers National Bank of all their liabilities (Par. 6, R. 4; Par. 6, R. 36-37; Exhibit A, R. 11-13; Exhibit A, R. 44-46).

The bills allege that the contract for the transfer of the assets and the assumption of the liabilities was fully carried out with the knowledge, approval, and acquiescence of the Comptroller of the Currency. All the assets of the two banks were transferred and delivered to the Farmers National Bank (Par. 9, R. 5; Par. 9, R. 37).

Thereafter both the Penn National Bank and the Reading National Bank ceased to exercise any control over their former assets (Par. 9, R. 5; Par. 9, R. 37), and the Farmers National Bank assumed control of all the commingled assets and used the same indiscriminately in the conduct of its business regardless of their source or origin (Par. 14, R. 6; Par. 14, R. 39). The only assets which the Penn National Bank and the Reading National Bank had thereafter consisted of their claims against the Farmers National Bank under the contract of assumption of their liabilities (Par. 25, R. 9-10; Par. 25, R. 42).

The petitioners contend that the comptroller was not bound "by the attempted merger of the three banks". They argue that no "legal consolidation" resulted from the contract and that the mingling of the assets did not create a "legal consolidation" (See Petitioners' Brief, pages 21, et seq.).

These contentions, even if sound, are irrelevant. The respondents' right to relief is based not on the proposition that there was a legal consolidation of the three banks, but upon the rights which accrued to the Penn National Bank and the Reading National Bank against the Farmers National Bank under the contract which provided for the transfer of their assets and the assumption of their liabilities.

There were two distinct contracts between these banks. Both are contained in the agreement executed February 17, 1933. The first contract contemplated a merger or consolidation under statutory provisions (12 U. S. C. Sec. 33). This contract was never completed. The second contract provided for a present transfer of the assets of Penn National Bank and Reading National Bank, both on the verge of insolvency, by resolution of their boards of directors,

conditioned upon the assumption of their liabilities by Farmers National Bank. This contract was within the powers of a national bank under the statutory provisions which confer on a national bank the power to exercise by its board of directors "all such incidental powers as shall be necessary to carry on the business of banking" (12 U. S. C. Sec. 24, seventh). This contract was fully carried out. The assets were transferred and the liabilities assumed.

The petitioners fail to recognize that the agreement contains two contracts. The first contract to merge or consolidate may have been dependent upon the performance of the second contract to transfer the assets, but the second contract was in no wise dependent upon the completion of the first contract to consolidate. The lower court therefore was not in error in ignoring the first contract. It had no bearing whatsoever upon the rights of the parties which had already accrued under the second contract, in conformity with which the assets had been transferred and the liabilities assumed.

It is submitted that the contract to transfer the assets was valid, that the sale of the assets was a valid transfer, and that the assumption of the liabilities created a lawful and enforceable obligation.

It has been repeatedly held that a transfer of assets, in consideration of the assumption of liabilities, by a national bank on the verge of insolvency, to another national bank, by virtue of resolutions of the boards of directors, is legal and not ultra vires of either bank. CITY NATIONAL BANK OF HURON v. FULLER, 52 Fed. (2) 870 (C. C. A. 8); B. V. EMERY & Co. v. WILKINSON, 72 Fed. (2) 10 (C. C. A. 10); HAYS v. WILKINSON, 72 Fed. (2) 201 (C. C. A. 10); RICHTER v. LAREDO NATIONAL BANK, 62 Fed. (2) 289 (C. C.

A. 5); ABERLY v. CRAVEN COUNTY, 70 Fed. (2) 52 (C. C. A. 4); WANNAMAKER v. EDISTO NATIONAL BANK, 62 Fed. (2) 696 (C. C. A. 4).

The contract to transfer the assets was consistent with the policy and provisions, express or implied, of the National Bank Act, and was therefore subject to state laws. JENNINGS v. U. S. F. & G. Co., 294 U. S. 216, 219. Under the law of Pennsylvania where one transfers all his property to another who agrees to pay all the debts of the transferror, not only the transferror but all creditors of the transferror have a direct claim against the transferee as beneficiaries of the contract. MITCHELL, RECEIVER OF LIBERTY CLAY PRODUCTS Co., 291 Pa. 282, and cases cited.

The contract of transfer of assets and assumption of liabilities did not require the approval of the Comptroller of the Currency to give it legal effect. As a matter of fact, however, it is alleged in the bills (Pars. 9; R. 5, 37-38) and not denied, that the transfer of assets and assumption of liabilities was "with the knowledge, approval, and acquiescence of the Comptroller of the Currency". It is also alleged in the bills and admitted by the motions, that the supplemental agreement of February 20, 1933 (Exhibits B, R. 13-14; 46-47) was entered into "at the direction of the Comptroller of the Currency" (Pars. 7; R. 4-5, 37). It is also alleged and admitted that thereafter the comptroller administered the transferred assets (Pars. 16; R. 7, 39-40).

(b) THE CLAIMS ARE SUFFICIENT TO PAY ALL THE DEBTS OF THE TWO BANKS WITHOUT THE NECESSITY OF AN ASSESSMENT ON STOCKHOLDERS.

The one bill alleges that the assets transferred by the Penn National Bank, consisting of cash on hand and due from banks, securities, loans and discounts, mortgage

loans, real estate and other property had a value in excess of $6,500,000, which after a depreciation of over $1,000,000, represented a fair and reasonable net market value of over $5,400,000 (Par. 10, R. 5), as against liabilities of approximately $5,100,000 (Par. 11, R. 5-6), an excess of assets over liabilities of more than $350,000 (Par. 12, R. 6).

The other bill alleges that the assets transferred by the Reading National Bank, similar in nature, had a fair and reasonable value in excess of its liabilities (Pars. 10, 11, 12, R. 38).

The amendments to the bills allege that the assets of the Farmers National Bank were similar in character and had a book value of approximately $9,500,000, and, after deducting a depreciation of approximately $1,500,000, had a fair and reasonable net market value of approximately $8,000,000, as against liabilities to creditors of approximately $9,000,000. In the event of ultimate deficiency there was in addition, the stockholders' liability of $1,000,000 (Amendment, Par. 1, R. 22-23; Amendment, Par. 1, R. 53-54).

The general claims of the Penn National Bank and the Reading National Bank included not only the obligation of the Farmers National Bank to the two banks and to their creditors, and also the stockholders' liability of $1,000,000, but, in addition, the assets of the Penn National Bank and the Reading National Bank transferred to the Farmers National Bank, and the commingled assets of the Farmers National Bank, were subject to an equitable lien or charge in favor of the Penn National Bank and the Reading National Bank and their creditors, and constituted a trust fund for their benefit (Amendment, Par. 1, R. 22-23; Amendment, Par. 1, R. 53-54).

The amendments to the bills definitely allege that the general claims of the Penn National Bank and the Reading National Bank against the Farmers National Bank as thus constituted, were then and now are more than sufficient in the ordinary course of liquidation to pay and discharge all liabilities of the two banks without the necessity of an assessment on the stockholders (Amendment, Par. 1, R. 22-23; Amendment, Par. 1, R. 53-54).

The majority opinion of the Circuit Court of Appeals gave due consideration to these allegations in the bills as amended. In his dissenting opinion, Judge Buffington in connection with his reliance upon the recitals in the order of assessment, quoted from the first opinion of the District Court in dismissing the bills, to the effect that they failed to show that the stockholders had suffered by the method adopted by the comptroller, and failed to show that the agreement of the Farmers National Bank to pay the liabilities of the two banks was worth more than the assets which were allocated in its place (R. 73). But these objections had been met by the amendments to the bills, and in its second opinion the District Court expressly had stated that its remarks in the first opinion on that point should be disregarded (R. 24). It was these remarks in the first opinion of the District Court which Judge Buffington quoted by inadvertence.

(c) The Comptroller Refused to Enforce the Claims.

As has already been pointed out, the bills specifically allege that the only resources which the Penn National Bank and the Reading National Bank had were the claim of each against the Farmers National Bank.

The bills also allege that the comptroller, the conservators, and the receivers failed, neglected and refused to

collect these claims and without warrant or authority of law, cancelled, abrogated and waived them in fraud of the rights of the two banks, their depositors and other creditors, and the stockholders thereof, and by reason thereof failed to comply with the conditions and provisions of the National Bank Act upon which stockholders of a national bank may be assessed (Par. 25, R. 9-1; Par. 25, R. 42).

(d) The Comptroller Without Authority Abrogated the Claims.

The bills allege that on February 17, 1933, the Penn National Bank and Reading National Bank transferred and delivered to the Farmers National Bank all their assets, surrendered complete control and possession thereof as well as their business, and in accordance with the provisions of said agreement, the Farmers National Bank appointed executive officers to conduct its business at the former places of business of said Penn National Bank and Reading National Bank under the designation of branches of the Farmers National Bank, and thereafter, with the knowledge, approval and acquiescence of the Comptroller of the Currency, his agents and representatives, ceased to exercise any control or dominion over their former assets and ceased to transact any business whatsoever. (Par. 9, R. 5, 37-38.)

The bills allege that immediately upon execution of said agreement of February 17, 1933, the Farmers National Bank with its combined resources and liabilities, comprising its own original resources and liabilities and those derived from the Penn National Bank and the Reading National Bank, carried on and conducted its regular banking business, commingled all its assets, regardless of their source of origin, and used the same indiscriminately in the

conduct of its business and in the discharge of its obligations whether original or assumed. (Par. 14, R. 6, 39.)

The bills further allege that on March 18, 1933, the Acting Comptroller of the Currency certified that the Farmers National Bank was unable to transact and carry on its ordinary banking business or to exercise its usual banking functions without prejudicing the rights of depositors and other creditors, and that he deemed it necessary to take immediate steps in order to conserve the assets of said bank for the benefit of depositors and other creditors and thereupon appointed Wellington M. Bertolet, Conservator of the Farmers National Bank under the provisions of the Conservation Act of March 9, 1933, who as such conservator under the direction of the Comptroller of the Currency, took possession of the books, records and assets of every description of the Farmers National Bank, which included not only the original books, records and assets of the bank, but those acquired by the bank under the terms of the agreement of February 17, 1933 from the Penn National Bank and Reading National Bank, and thereafter, the conservator of the Farmers National Bank, pursuant to his duty as such administered all the assets of the Farmers National Bank including the assets which had been derived by the Farmers National Bank from the Penn National Bank and Reading National Bank. (Pars. 15-16, R. 6-7, 39-40.)

The bills further allege that on or about October 10, 1933, eight months after the transfer of the assets had taken place, the comptroller without notice of any kind to the two banks or to their creditors or stockholders, without a hearing, and without warrant or authority of law or a decree or order of a court of competent jurisdiction, made a ruling to the effect that the agreement of February 17, 1933 was with-

out legal effect and directed that the transfer and delivery of the assets and the assumption of liabilities thereunder should be disregarded (Par. 17, R. 7; Par. 17, R. 40).

Thereupon in pursuance of his ruling, the comptroller appointed as conservator of the Penn National Bank and of the Reading National Bank, Wellington M. Bertolet who had previously been appointed conservator of the Farmers National Bank (Par. 18, R. 7-8; Par. 18, R. 40).

Under date of October 20, 1933, the comptroller proposed a so-called plan of reorganization of the three banks based upon his ruling, which provided for the organization of a new national bank, the issuance of stock and securities, a pledge of assets to secure a loan from the Reconstruction Finance Corporation and a sale of assets to the new national bank in consideration of which the new national bank was to establish on its books lump sum credits for the benefit of the conservator of each of the three banks in an amount sufficient to permit a distribution to be made to the depositors and other creditors of each of the banks in the following percentages of the claims against them: 35 per cent. to the Farmers National Bank; 25 per cent. to the Penn National Bank; and 25 per cent. to the Reading National Bank (Par. 19, R. 8, Amendment, Par. 2, R. 23; Par. 19, R. 40-41; Amendment, Par. 2, R. 54).

Wellington M. Bertolet, as conservator of each of the three banks, each of which had interests adverse to the other, pursuant to the instructions of the comptroller, abrogated the agreement of transfer of February 17, 1933, and ignored and disregarded the claims of the Penn National Bank and the Reading National Bank against the Farmers National Bank in putting into effect the so-called plan of reorganization (Pars. 20, 21, R. 8-9; Pars. 20, 21, R. 41).

The bills allege that the ruling of the comptroller and his action thereunder in abrogating the agreement, was beyond the powers conferred upon him under the National Bank Act or other statutory law, was an unlawful assumption of judicial power neither delegated to him by statute nor capable of being delegated, and was in violation of the rights of the Penn National Bank and the Reading National Bank, and the depositors and other creditors and stockholders thereof, and deprived them of their property without due process of law (Par. 22, R. 9; Par. 22, R. 41).

It is respectfully submitted that the comptroller can point to no authority whatever to justify his conduct. His authority, of course, is entirely statutory. The only statutes applicable to this situation are the National Bank Act and the Conservation Act of March, 1933 (12 U. S. C. Sec. 203).

In the first place, it is doubtful whether under the latter act he had the authority to appoint a conservator for either the Penn National Bank or the Reading National Bank, which he did in October, 1933. Both banks had ceased business and had sold all their assets eight months before. The Conservation Act authorizes the comptroller to appoint a conservator for the conservation of the assets pending further disposition of the business as provided by law. The further disposition is either the resumption of business by the bank (Sec. 204) or reorganization (Sec. 207). In the instant case resumption of the business of the two banks was out of the question. They had agreed to go out of business and had gone out of business. For the same reason it is highly doubtful whether any reorganization of the two banks could have been possible within the meaning of the act.

But aside from this point, neither the National Bank Act nor the Conservation Act confers any authority upon the comptroller, nor upon any conservator or receiver appointed by the comptroller, to abrogate or cancel valid contracts which have been fully executed and under which the rights of the parties have been fixed. When the comptroller attempted to do so he was attempting to exercise judicial power, which not only is not conferred upon him by law, but which, if it were, would require a judicial determination after notice and hearing.

Moreover it cannot be contended by the petitioners that the National Bank Act in Sec. 192 gave the receivers authority to dispose of the claims of the two banks against the Farmers National Bank in the manner in which it was attempted. The statute requires a receiver to collect all debts, dues and claims belonging to the bank. In the case of bad or doubtful debts the receiver is authorized to sell or compound them but only upon an order of a court of record of competent jurisdiction. No such order was ever sought or obtained in this case (Par. 17, R. 7; Par. 17, R. 40).

It is clear, therefore, that the comptroller acted without authority, and in an arbitrary manner. His conduct was capricious. It violated the rights of the creditors and stockholders of the Penn National Bank and Reading National Bank and deprived them of their property without due process of law.

As stated in the majority opinion of the Circuit Court of Appeals (R. 68), ". . . it was beyond the power of the Comptroller, eight months afterward by mere ipse dixit, to set aside the contracts between the banks and proceed as though they had never been made. . . . Congress did not give him such power. No principle of law, which, in

our opinion, authorizes the Comptroller to do this has been cited by counsel or the court below." Again the court said (R. 70), "He abrogated and set aside valid contracts between the banks and did not take into account, when he made the levy, the contract obligation of the Farmers Bank to pay 'all the deposit liabilities, except liability to stockholders as such', but with administrative fiat, without notice to the banks, without a hearing and without due process of law, he stripped the banks of their only assets, which it is alleged and not denied, were sufficient to pay all the debts of the banks without the necessity of making an assessment, and thereupon substituted the portion of the assets of the Farmers Bank, to which he thought under changed conditions and materially different circumstances the other two banks would be entitled at that time. He thus without authority and contrary to law tried to create a new situation upon which he determined the necessity of enforcing individual liability of stockholders."

The bills of complaint and the amendments thereto specifically allege the facts to show such arbitrary and unlawful conduct.

V.

The Contention That Respondents Are Guilty of Laches Was Not Considered by the Circuit Court of Appeals, Was Not Mentioned in the Petition for Writ of Certiorari or in the Specifications of Error, and Is Without Merit.

The petitioners contend that the respondents are guilty of laches (See Petitioners' Brief, pages 35 et seq.). The question of laches was not considered by the Circuit Court of Appeals and was not mentioned in the petition for writ

of certiorari or in the specifications of error. Under these circumstances the question is not properly before the Court for review. ZELLERBACH PAPER CO. v. HELVERING, 293 U. S. 172; HELVERING v. TAYLOR, 293 U. S. 507, 511.

The petitioners make the statement that the respondents complain of the fact that the comptroller proposed a plan of reorganization which involved a sale of *their* assets to a newly organized bank. That statement is incorrect. The assets which were involved in the sale were the assets of the Farmers National Bank, which acquired title to them on February 17, 1933, from the Penn National Bank and the Reading National Bank. The petitioners further state that the respondents complain about the division of the proceeds of the sale among the three banks and of the fact that the conservator, acting under instructions from the comptroller, reallocated the assets among the three banks without attributing proper value to the claim of the Penn National Bank and Reading National Bank against the Farmers National Bank. While these allegations are made in the bills of complaint, they are made not as the basis for the right to equitable relief, but as showing the arbitrary and capricious conduct of the comptroller in attempting to abrogate the valid claims of the Penn National Bank and the Reading National Bank against the Farmers National Bank which were their only resources for the payment of their liabilities and which were sufficient to pay all their debts.

The complaint of the respondents, as specifically set forth in the bills, arose on January 15, 1935, when the comptroller made the order of assessment. Within five weeks thereafter the respondents filed their suits to have the order set aside as invalid and illegal. Until the assessment was made, the respondents could rightfully presume that the

actions of the comptroller, the conservators, and the receivers were regular and lawful.

The petitioners further contend that the stockholders must be taken to have known of the proposed plan of reorganization, the sale of assets to the new bank, and the reallocation of the assets among the three banks. But the bills expressly allege that the comptroller acted *without notice* to the Penn National Bank or the Reading National Bank, to their depositors and other creditors, or to their stockholders (Par. 17, R. 7; Par. 17, R. 40).

It is thus clear that the bills do not disclose laches.

CONCLUSION.

The respondents submit that the statutory liability of stockholders of a national bank is a conditional one. The power of the comptroller to make an assessment is not an unlimited power. Before he may exercise his judgment as to the necessity and amount of an assessment, the ordinary resources of the bank must have been exhausted. This is the basic or quasi-jurisdictional fact upon which his power is conditioned. Unless this fact exists there is no power in the comptroller to make an assessment. In the present case the allegations of the bills, which are deemed admitted, set forth that this fact did not exist.

It is further submitted that a court of equity may restrain any administrative official, including the comptroller, where he acts beyond his authority, violates the requirements of due process, or where his actions are arbitrary and capricious. In the present case the allegations of the bills set forth in detail such arbitrary and capricious conduct on the part of the comptroller and the receivers in violation of the requirements of due process.

It is submitted that the bills of complaint set forth a cause of action which entitle the respondents to the relief prayed for.

This Court should affirm the decree of the Circuit Court of Appeals.

Respectfully submitted,

EDWARD W. MADEIRA,
GEORGE EVES,
JOHN B. STEVENS,
HARRY W. LEE,
EDWARD D. TREXLER,
W. BRADLEY WARD,
LEMUEL B. SCHOFIELD,
Attorneys for Respondents.

APPENDIX.

THE CONGRESSIONAL GLOBE, May 10, 1864, 38 Cong. 1st Session, pp. 2203-2204.

MR. COWAN: I move to amend the bill in the fiftieth section in the eighth line after the word "collect," by inserting:

> An amount from each shareholder equal to the amount of stock held by such stockholder in such association, and

So that the clause will read:

> That on becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he shall deem proper, who, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect an amount from each shareholder equal to the amount of stock held by such stockholder in such association, and all debts, dues and claims belonging to such association, &c.

I will merely remark that this is to add a still further security to the remedial provisions of the bill. It is provided in the twelfth section that

> The shareholders of each association formed under the provisions of this act, and of each existing bank or banking association that may accept the provisions of

this act, shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.

From that it will appear that each shareholder is liable not only for the amount of stock which he has invested in the association, but in case of its failure or insolvency he is liable for an amount equal to that stock, over and above the original investment; but there is no adequate provision in my opinion by which the liability could be available as assets in case the association became insolvent; and in order to remedy that, I propose to insert that the receiver who shall be appointed by the Comptroller when the bank fails, among other things shall be authorized to collect from each shareholder an amount equal to the stock held by him in the association, and that that amount when so collected shall go into and become part of the assets of the association for the payment of its creditors. I think there can be no objection to that. It furnishes a remedy which perhaps the creditor would not otherwise have.

MR. SHERMAN: The language of the amendment of the Senator from Pennsylvania does not conform to the exceptions made in the bill as to individual liability; but I submit to him an amendment which I think will accomplish his object, and I desire to see it accomplished. If what I have drawn up is satisfactory to him, I hope he will accept it as a substitute for his amendment. There are exceptions and qualifications of the individual liability in section twelve, which would not be covered by his amendment. I move this amendment to come in at line thirteen, section fifty, after the word "direct":

And may, if necessary to pay the debts of such association, enforce the individual liability of the stockholder provided for by the twelfth section of this act.

MR. COWAN: I am fearful that will not accomplish what I design, because it leaves the difficulty precisely where we find it, and that is as to how shall this individual liability be enforced.

MR. SHERMAN: By suit.

MR. COWAN: If by suit, what shall be recovered? It will be observed that the shareholder is bound to pay to the amount of the stock he has subscribed, in addition to that stock, but equally and ratably, and not one for another. He is not surety for his fellows; he is only to pay his share of the loss. Unless the receiver shall have authority to collect this, it will be almost utterly impossible for the creditors of the association to achieve anything out of that remedy, and I desire by my amendment to give the receiver authority to collect upon the individual responsibility obligation of the shareholder at the same time that he commences to collect the other part of the assets of the bank, and in that way he will have them all together. If the institution turns out to be solvent, of course the shareholder will get his money back. If it turns out that only a portion of the money will be required to meet the liability, he will get the residue back. But if there is anybody to have the advantage of it, the creditor will have the advantage, and the creditor ought to have the advantage, because the default is on the part of the stockholder and the institution of which he is a shareholder. But to say that the receiver shall go on and collect all other debts and dues belonging to the association, and then distribute them, and afterwards proceed against the stockholders upon the individual lia-

bility clause, is, to my mind, to fritter away the remedy so as to make it worthless.

I hope the Senate will adopt the amendment I have proposed, which is fair, and which is but just to the creditor. These creditors should have a remedy, and they should have it directly and without any delay whatever. This debt which is due from the stockholder on his individual responsibility obligation is just as much a part of the assets of the association as that stock which is paid in, and it ought to be as promptly forthcoming to meet claims against the association as that which is paid in; and I therefore hope that the receiver will have authority, the moment he is appointed, to go on and collect it. If it is needed, it will be there ready for the creditor; if it is not needed, the shareholder will get it back again when the association is wound up.

Mr. Sherman: The statement of the Senator from Pennsylvania shows that he either misconceives the provision of the bill or wishes to make this proceeding unreasonably harsh. This individual liability is a contingent liability to make good all deficiencies, if any occur, in the payment of the debts of the association. Under his amendment it will be the duty of the receiver first of all to collect from the stockholders an amount equivalent to their stock, instead of proceeding to collect the assets of the association and the debts due to it. It may happen that when those debts and assets are collected there will be ample to pay all demands. That may be apparent on the face of the statement of the bank at the time of its failure. There would then be no necessity for making a collection from the stockholders. But the Senator says that if the money is collected it can be refunded to the stockholders when it

is found not to be needed. That is a roundabout and unreasonable way of enforcing an individual liability.

The amendment I offer will give the receiver, whenever he ascertains that it is necessary to enforce this individual liability, the right to enforce it by suit. It seems to me, therefore, that the amendment I propose will carry out the purpose of the bill, to enable the receiver at any time, whenever it becomes necessary, to enforce the individual liability; and in case it is not necessary, if the other assets are sufficient, he will not enforce this contingent liability, which is intended as an ultimate security of the creditors of the bank.

Mr. Johnson: The provision in question is to be found in a great many charters; but never heretofore, in any instance that I am aware of, has it been held that the personal liability of the stockholder is to be enforced until it is ascertained that the assets of the bank or association are not sufficient to meet the demands upon it. In other words, the responsibility of the stockholder for the amount of his stock, or, as is sometimes the case, the absolute responsibility of the stockholder for the amount of the debt, is a responsibility contingent upon the failure of the assets of the bank or the association to meet the demands upon it, and is never enforced until that fact is ascertained, and it is done by a bill in chancery. The proposition of the honorable Senator from Pennsylvania would subject these stockholders to a suit at once, and each man may be compelled and will be compelled to pay, according to his amendment, an amount equal to the amount of the par value of his stock, and that will be enforced by suit, and it may turn out in the end that there was no necessity to bring suit. The only security to the billholder or the creditors of the

bank that the amendment offered by the member from Pennsylvania will give is the chance that the stockholders are more able to pay at once than they will be able to pay after the actual sufficiency or insufficiency of the assets of the bank shall have been ascertained. It appears to me, however, rather an unnecessary hardship on the stockholders, and without really giving any additional substantial security to the creditors.

MR. COWAN: With all deference I differ as to the character of the liability. It is said to be a contingent liability, and only to be resorted to in the event that the other assets of the bank are not sufficient to meet the claims upon it. I think on the other hand that it is a direct liability, and that the amount involved in it is as much liable to the payment of the claims of the just creditors of the bank as any other portion of the assets of that bank. But if we suppose for one moment that all other debts and dues and assets of the bank are collected and distributed to and among the creditors, then I should like to know what this individual liability clause is worth in the shape in which it stands here? The stockholder is not a surety for his costockholder; he is only bound equably and ratably for his proportion. How could it be enforced by even a bill in chancery? How many judgments would there be against him? What would be the amount of these several judgments? Here are ten thousand note-holders, if you please. He is equably and ratably bound to pay to each one of them his share of the indebtedness of the association to them. If there are a thousand stockholders, and the holder of a five dollar note is a claimant, he would only be bound, supposing each stockholder to have one share, to pay that fellow half a cent. Then that one is to have judgment for half a cent against him, and another one for another half cent, and so on.

Mr. President, I do not know what the experience of the honorable Senator from Maryland may be in enforcing an individual liability clause of this kind; but if he has ever known any one of them enforced, and if he has ever known any fruit to be derived from a remedy of this kind, he has known more than I have. Put in here, they are a snare and a delusion; but with such an amendment as I offer they will become valid and binding on the shareholders, and the moment the bank fails every shareholder knows that in addition to the stock he has already paid in he is bound to pay up a similar amount. It is not necessary that he shall be sued. He need not sustain an action if he chooses. All he has to do is to continue his position as shareholder or stakeholder, if you please, because the money he puts in is merely in pledge that the assets shall redeem the liabilities of the bank. If the money is not wanted he will get it back again. If a portion of it is wanted he will get the residue back; and there is nothing unjust in it.

But if there is to be no individual liability, no responsibility on the part of the shareholder, or if that responsibility is not to be enforced by the proper remedy, let the bill remain as it is, or leave it to the remedy proposed by the Senator from Ohio, which, in my opinion, is no remedy at all, just leaving it where it was. Require the shareholder honestly and fairly, for the benefit of those who have trusted this association, who have dealt with it upon the faith of this clause, to put up his money, and after the debts are paid, if there is any over he will get it back, and if the debts are not paid he will not get it back. That is the fair meaning of it. I hope the amendment may be agreed to.

THE PRESIDENT *pro tempore:* The question is on the amendment submitted by the Senator from Ohio to the amendment of the Senator from Pennsylvania.

MR. COWAN called for the yeas and nays; and they were ordered.

MR. ANTHONY: Let the amendment to the amendment be reported.

The Secretary read the amendment of Mr. Cowan and the amendment of Mr. Sherman.

MR. COWAN: I submit that the proposition of the Senator from Ohio is not an amendment to my amendment.

MR. SHERMAN: If my amendment be adopted, of course it will dispense with the amendment of the Senator from Pennsylvania, and therefore it is a substitute for it.

THE PRESIDENT *pro tempore:* The Chair understands that the amendments are to different parts of the section; each would, therefore, more properly be a separate amendment of itself, but one can be treated as a substitute for the other by general understanding.

MR. COWAN: Then I ask that the vote may be taken on my amendment first, if that be in order.

MR. SHERMAN: I have no objection to that course. I will only repeat that the amendment of the Senator from Pennsylvania would substantially require this contingent liability to be enforced first; that is, before the debts due to the bank were collected the receiver must collect the amount from the stockholders for which they might be liable in a contingency, leaving the debts to be collected afterwards.

MR. COWAN: That is a *non sequitur;* it does not necessarily follow. The receiver is to have authority to collect not only all the debts due to the bank but also to collect that which would be due from the stockholders on their individual liability clause. He may do it first if he chooses, or he may do it last. Something must be left to his discre-

tion and that of the Comptroller in endeavoring to enforce the remedy. He will not be likely to do it if it is unnecessary.

MR. ANTHONY: Do I understand that the whole contingent liability of the stockholders is to be collected in the first instance, whether it be found necessary to resort to that or not, and then if it shall not be found necessary to resort to that, or it shall only be found necessary to resort to part of that, to return the balance? Are we to go through the expense of collecting and returning it without ascertaining whether it is necessary?

MR. SHERMAN: That is the precise difference between the two. My amendment provides for enforcing the contingent liability as soon as it is ascertained that it is necessary.

MR. COWAN: It is not exactly as stated by the honorable Senator from Rhode Island. The receiver will have the authority to do what he alleges is contemplated in the amendment, but it will not be obligatory on him to do it. He may resort to the collection of this fund immediately on accepting the appointment of receiver, or he may wait and bide his time until he ascertains whether it will be necessary to resort to that or not. He is to have the authority by the amendment that I offer.

THE PRESIDENT *pro tempore:* The question will be on substituting the amendment of the Senator from Ohio for that proposed by the Senator from Pennsylvania. That will be the question before the Senate.

The question being taken by yeas and nays, resulted—yeas 26, nays 10; .....

So the amendment to the amendment was adopted.

SUPREME COURT OF THE UNITED STATES.

Nos. 123 and 124.—October Term, 1937.

Harvey S. Adams, as Receiver, Penn National Bank and Trust Company of Reading, Pennsylvania, Petitioner,
123 *vs.*
Geneva M. Nagle, et al.

Harvey S. Adams, as Receiver, Reading National Bank and Trust Company of Reading, Pennsylvania, Petitioner,
124 *vs.*
J. Edwin Tobias, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 28, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

These are stockholders' suits to enjoin the receiver of two national banks from enforcing assessments ordered by the Comptroller of the Currency pursuant to the statute governing the additional liability of shareholders.[1]

The respondents in No. 123 are stockholders of the Penn National Bank and Trust Company of Reading, Pennsylvania; those in No. 124 are stockholders of the Reading National Bank and Trust Company of the same city; and the petitioner is receiver of both banks. The controversy has its origin in a transaction between the two banks and the Farmers National Bank and Trust Company of Reading. The causes of action are identical and it will suffice to outline the allegations of the bill in No. 123. These are:

On February 17, 1933, Penn and Reading were subjected to unusual withdrawals which depleted their reserves and placed both on the verge of insolvency. Due to this condition the two banks

[1] R. S. § 5151; Act of Dec. 23, 1913, c. 6, § 23, 38 Stat. 273, U. S. C. Tit. 12, §§ 63 and 64.

on that date entered into an agreement with the Farmers contemplating a consolidation of the three in accordance with Title 12 U. S. C. §§ 33 and 34. The agreement called for a valuation of the assets of the three banks with ensuing recapitalization and for the Comptroller's approval of the terms of consolidation as required by law. It further provided for transfer by Penn and Reading of all their assets to Farmers, with the right to hypothecate and rehypothecate them, and for assumption by Farmers of the liabilities of the transferring banks except that to stockholders, they reserving the right to enforce against their stockholders any statutory excess liability. Farmers was to operate their banking houses as its branches. On the same day Penn and Reading turned over their assets to Farmers which mingled them with its own and thereafter dealt with them as its own. There is no assertion that on February 17 the Comptroller knew, or approved, of the agreement and transfer. It is alleged, however, that, by his direction, a supplemental agreement was made February 20, 1933, by which Penn and Reading guaranteed to Farmers that the assets of each would exceed in value its liabilities assumed by Farmers under the agreement of February 17; and that he acquiesced in the continued administration of the affairs of Penn and Reading by Farmers. On February 17 the assets of Penn which were transferred to Farmers had a reasonable market net value of $5,400,000 as against total liabilities of $5,100,000, and the assets of Farmers were of the fair value of $8,000,000 (to which is to be added the stockholders' liability for assessment in the amount of $1,000,000), as against liability to creditors of $9,000,000.[2] The claims of the two banks against Farmers were, at the date of transfer, and still are, more than sufficient, in the ordinary course of liquidation, to pay all of their liabilities without the necessity of an assessment of the stockholders.

Farmers continued to do business with the combined and commingled assets from February 17 to March 18, 1933. Then the Comptroller appointed a conservator who took possession of all of the assets. October 10, 1933, the Comptroller, without notice to Penn or Reading, their depositors, creditors, or stockholders, and without a hearing, ruled that the agreements of February 17 and

[2] The bill in No. 124 alleges that on the same day Reading's assets exceeded in value its liabilities of approximately $9,000,000.

February 20 were without legal effect and directed that the transfer and delivery of the assets, and the assumption of liabilities thereunder, should be disregarded; and he attempted to allocate among the three banks the assets theretofore transferred and delivered to Farmers. He appointed the same person he had previously named conservator for Farmers to be conservator of the other two banks. October 20, 1933, the Comptroller proposed a so-called plan of reorganization of the three banks which provided for the organization of a new national bank, the issue by it of stock and securities, the pledge of some of its assets to secure a loan from Reconstruction Finance Corporation, a sale of the assets in the possession of the conservator of Farmers to the new national bank, and a division of the proceeds on the basis of thirty-five per cent. to Farmers, twenty-five per cent. to Penn, and twenty-five per cent. to Reading. It is charged that this division was arbitrary and was based on a classification adopted from the report of national bank examiners dated April 24, 1933, and not on the financial condition of the banks as of February 17, 1933, the date of the execution of the agreement, transfer of assets, and assumption of liabilities. The conservator of all three banks, in furtherance of the plan, reconstructed the assets and liabilities of each as of April 24, 1933, made a division thereof amongst the banks, consummated the sale to the new bank, and apportioned the proceeds according to the plan. In so doing, in conformity with the Comptroller's ruling, he disregarded all rights and obligations arising from the agreement of February 17, 1933, and disregarded the claim of Penn, in the amount of $5,100,000, and the claim of Reading, in the amount of $9,000,000, against Farmers. The bills charge that this conduct was arbitrary, and that the Comptroller's ruling respecting the two agreements was beyond the powers conferred upon him by the National Bank Act or other statutory law, was an unlawful assumption of judicial powers not delegated to him by statute, or capable of being so delegated, was in violation of the rights of Penn and Reading, their depositors, other creditors, and stockholders, and deprived them of their property without due process of law.

After consummation of the plan of reorganization the Comptroller certified that each of the three banks was insolvent and, in October and November 1934, appointed a receiver for each of them. January 15, 1935, he certified that, upon a proper accounting by

the receivers of Penn and Reading, and a valuation of the uncollected assets remaining in their hands, it appeared that a 100% assessment was necessary to pay their debts and he accordingly ordered such an assessment. The bills characterize his conduct as a failure, neglect, and refusal to collect the claims of Penn and Reading against Farmers and a consequent failure to comply with the conditions and provisions of the statute authorizing assessments of stockholders, and as "in fraud of the rights" of Penn and Reading, their creditors and stockholders. His ignoring the claims is charged to have been "a grave error of law based upon his unwarranted assumption of judicial power in abrogating, cancelling, and waiving" the claims of Penn and Reading against Farmers, and "adjudicating the private rights and obligations of parties not subject to his power and control", which invalidated the assessments.

The receiver interposed motions to dismiss which were sustained by the District Court. The Circuit Court of Appeals reversed,[1] holding the bills set forth a cause of action since, if their allegations were true, the Comptroller had exceeded his statutory power and acted arbitrarily in ordering the assessments. The importance of the question involved and asserted conflict of decision moved us to grant certiorari.

The petitioner's position is that the agreement and transfer of assets to the Farmers did not effect a statutory consolidation; that the Comptroller was, therefore, at liberty to treat all three banks as separate entities for the purpose of assessing stockholders' liability and that stockholders may not, by a proceeding in equity, challenge his official findings as to insolvency and necessity for an assessment. The respondents say the Comptroller's power of assessment is conditioned on a basic or quasi-jurisdictional fact,—that the ordinary resources of a bank have been exhausted,—and, if they have not been, or are deficient only because of the Comptroller's unlawful abrogation of and refusal to require collection of a valid claim sufficient to pay the bank's debts, the assessment is subject to direct attack as in excess of that officer's statutory power, as arbitrary, capricious, and a denial of due process of law. We are of opinion that the assessments were not subject to attack

[1] 88 F. (2d) 936.

or frustration in these proceedings upon the grounds set forth in the bills.

1. The agreements of February 17 and February 20 did not effect a consolidation in conformity with the National Banking Act so as to constitute the existing stockholders of Penn and Reading, together with the stockholders of Farmers, stockholders of a consolidated bank. The steps requisite to such consolidation were never taken.[4]

2. When the Comptroller took charge of the banks in question he was bound to deal with them, so far as their assets and liabilities were concerned and in respect of stockholders' liability, upon the basis that they were three separate associations. This conclusion is unaffected by the legality and effectiveness of the agreement of February 17, 1933, upon which respondents insist.[5] At most the agreement substituted a new asset—the promise of Farmers—for the old assets. Respondents do not claim that the contract and the transfer pursuant to it worked a novation whereby the creditors of the transferring banks became creditors of the transferee. So far as the Comptroller was concerned these creditors were still those of the former and entitled to look to their assets for payment.

3. Whether the Comptroller took the view that the contracts and what was done under them were effective to commute the physical assets of Penn and Reading into a chose in action against Farmers, or that the transaction did not so operate but left Penn and Reading owners of their assets so far as they could be identified and segregated, it was not, as respondents suggest, a condition precedent to the validity of his assessment that he should have exhausted the assets of Penn and Reading.

At the argument the position was taken that the Comptroller was without power to lay an assessment until he had gotten in the avails of all the ordinary assets of the banks and that the claims of Penn and Reading against Farmers under the contract of February 17 were such ordinary assets. The conclusion is that until the receiver of Penn and Reading had recovered upon the contract and

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[4] See U. S. C. Tit. 12, § 33.

[5] Compare City National Bank v. Fuller, 52 F. (2d) 870; Wannamaker v. Edisto National Bank, 62 F. (2d) 696, 699; Emery & Co. v. Wilkinson, 72 F. (2d) 10, 12.

distributed the proceeds the Comptroller was without power to order an assessment. No decision of any court was cited to support this position, but it was sought to maintain it by reference to an amendment of the National Bank Act of June 3, 1864,[6] offered and adopted in the Senate. The purpose of this amendment was stated to be to "enable the receiver at any time whenever it becomes necessary, to enforce the individual liability; and in case it is not necessary, if the other assets are sufficient, he will not enforce this contingent liability, which is intended as an ultimate security of the creditors of the bank." We think the adoption of the amendment in the light of the explanation is far from sustaining the respondents' contention. It has always been recognized that if the assets of a closed national bank are sufficient to answer its liabilities the Comptroller is not to levy an assessment, but to him is confided the determination of the sufficiency of the assets and, if he concludes they are insufficient, it is not only his right but his duty immediately to invoke the contingent liability of the stockholders. This has been the invariable administrative practice and any other would tend to depreciate the availability and the value of stockholders' liability.

4. The question remains whether, if the Comptroller's action arose from mistake of fact or law, the remedy here invoked is appropriate. In establishing the national banking system Congress has invested the Comptroller, an administrative officer, with jurisdiction to appoint a receiver after investigation and a finding that a bank has become insolvent, and to order an assessment up to one hundred per cent. of the par value of the stock against the shareholders to pay creditors' claims if, upon an investigation, he finds that the assets are insufficient to pay the debts. Plainly these are questions for the exercise of administrative discretion. The necessity for vesting this power in an administrative officer springs from the desirability of prompt liquidation. It would be intolerable if the Comptroller's decision could be attacked collaterally in every suit by a receiver against the shareholders to collect the amount of the assessment. It is settled this cannot be done.[7] It would be equally intolerable if stockholders as a class could call

[6] c. 106, 13 Stat. 99.

[7] Kennedy v. Gibson, 8 Wall. 498, 505; Casey v. Galli, 94 U. S. 673, 681; Bushnell v. Leland, 164 U. S. 684.

upon a court to review the Comptroller's exercise of his discretion. For a court to entertain a suit for this purpose would be to render nugatory the functions Congress has confided in the Comptroller. It has often been decided this may not be done.[8]

The respondents, however, urge, and the bill charges, that the Comptroller, in ruling that the contract of February 17 should be disregarded, and the receiver, in following this ruling, exceeded their statutory powers and acted arbitrarily and may be enjoined from enforcing an assessment based on the ruling. The contention rests upon a statement in *United States* v. *Knox*, 102 U. S. 425: "Although assessments made by the comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the shareholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction." This was said in a case where a creditor sought a mandamus to compel the Comptroller to order an assessment, he having refused so to do on the ground that the very terms of the statute forbade such action. Relying on this expression a number of the federal courts have said that, while an assessment may not be collaterally attacked, it may be voided by direct attack for "clear error of law, fraud or mistake."[9] Respondents admit this statement is too broad. Other courts have said that the only ground of successful attack is fraud on the part of the Comptroller.[10] This case presents no such basis for relief. The bills do not charge bad faith or fraud on the part of the Comptroller. The averment that his ruling with respect to the contract of February 17 and the consequent action of the receiver were "in fraud" of the rights of Penn and Reading and their

[8] Liberty National Bank v. McIntosh, 16 F. (2d) 906; Wannamaker v. Edisto National Bank, *supra*; Meeker v. Baxter, 83 F. (2d) 183; Davis Trust Co. v. Hardee, 85 F. (2d) 571; Acker v. Hamilton, 85 F. (2d) 574; Barbour v. Thomas, 86 F. (2d) 510; Church v. Hubbard, 91 F. (2d) 406.

[9] See, e. g., Dewecse v. Smith, 106 Fed. 438, 445; Emery & Co. v. Wilkinson, 72 F. (2d) 10, 12; Trustees v. Picher, 90 F. (2d) 741, 743; United States Nat. Bank v. Pole, 2 F. Supp. 153, 157; Angeny v. Kouper, 16 F. Supp. 542, 543.

[10] O'Conner v. Watson, 81 F. (2d) 833, 836; Meeker v. Baxter, 83 F. (2d) 183, 186; Davis Trust Co. v. Hardee, 85 F. (2d) 571, 573; Dunn v. O'Connor, 89 F. (2d) 820, 827.

stockholders falls far short of any charge of actual fraud. Indeed no suggestion of such fraud was advanced by respondents either in brief or in argument.

The respondents rely upon decisions holding that a bill in equity or a writ of mandamus will lie to compel an executive officer to comply with the plain mandate of a statute. These have no application for they deal with a situation wholly foreign to that here presented. Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except upon certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate; but if a discretion is vested in him, and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he has exceeded his jurisdiction by reason of an error either of fact or law which induced his conclusion. Plainly, therefore, the respondents are wrong in asserting that as the facts set forth in their bill charge the Comptroller with an error of law, he exceeded his authority.

The respondents further insist that their allegation that the Comptroller's action was "arbitrary", which is amplified and given content by the facts alleged and admitted by the motion to dismiss, requires a decree avoiding the assessment. The epithet "arbitrary", used in this connection, can mean no more than do the other averments that the Comptroller, in reaching his conclusion, "committed grave error of law" in failing to regard the contract of February 17 as effective. It would be arbitrary, in the proper sense of the term, for an official to act in the teeth of a statute or stubbornly to refuse to act at all where a statute commands action, but where he essays to exercise the jurisdiction conferred upon him, though his errors may be subject to subsequent correction, they cannot be enjoined as an arbitrary exercise of his authority. To hold otherwise would render orderly administrative procedure impossible.

A reference to the situation with which the Comptroller was confronted when his receiver took charge of the banks will serve to demonstrate that a case was presented calling for the exercise of his discretion. The bill asserts that over a substantial period subsequent to the transfer of Penn's and Reading's assets to

Farmers these were intermingled with Farmers' assets. It avers that an attempted segregation of assets was made upon the basis of a report of bank examiners dated April 24, 1933, more than two months after the transfer; it alleges that, at the date of transfer, Farmers owed $9,000,000 against which it had assets of $8,000,000 and a possible recovery by way of stockholders' liability of an additional million dollars; it fails to state what the condition of Farmers was when a conservator was appointed for it; what its condition was when a receiver was appointed for it; what its financial status is today. The pleader contents himself with the statement of a conclusion that the "claims" of Penn and Reading against Farmers were, at the time of transfer of their assets, and still are, sufficient in amount to pay all of those banks' creditors. But if the allegation is true, the only conclusion to be drawn from it is that in ordering the assessment the Comptroller erroneously estimated the value of the banks' assets. Whatever may be thought of the legality of the transfer of assets pursuant to directors' action on the eve of insolvency, the creditors of Penn and Reading were not bound to look to Farmers and might prefer to look to the assets transferred or to so much of them as could be traced. And there well may have been reason for the Comptroller to doubt the legal efficacy of the transfer in the face of creditors' attack. These and other matters were to be considered by him in arriving at an informed judgment as to the availability and value of the assets of Penn and Reading to answer the claims of their creditors. As an exercise of the discretionary power vested in him, the Comptroller's action must be treated as final and conclusive as to the necessity for an assessment.

5. If the Comptroller's decision with respect to the contract of February 17 was erroneous as matter of law the stockholders may or may not have a remedy. But their remedy is not to attack, or seek to evade payment of, the assessment. The collection of the assessment cannot be made to await the outcome of litigation of that question. Moreover, if, as they assert, the Comptroller's judgment is wrong and the assets of Penn and Reading, consisting of their claims under the contract, are sufficient to pay their creditors, the amounts paid pursuant to the assessments will be returned to stockholders in final liquidation. Meantime, however, the credi-

tors, the protection of whose interests is the primary object of the statute, will have been paid and, as is right, reimbursement of the stockholders will await possible realization upon assets which the Comptroller believes insufficient to satisfy the creditors.

The decrees are reversed and the causes remanded with instructions to dismiss the bills.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.